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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TRUDIE P. WESTMORELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Section 666(b) of Title 18 of the United States Code requires a misuse of Federal funds and a taking in excess of $5,000.00 and further, whether the ambiguity of the statute renders it unconstitutional. (This is an important question of federal law which has not been, but should be, settled by this Court.)

2. Whether rebuttal testimony offered by the government of an "on-going investigation" of alleged prior misconduct on the part of a Defendant is admissable. (The decision rendered by the Fifth Circuit Court of Appeals is in conflict with a decision of another Federal Court of Appeals on the same issue.)

3. Whether hearsay evidence is admissible as proof of predisposition and whether evidence to prove guilt by association is harmless error. (The Lower Court of Appeals rendered a decision on this point which is in conflict with previous decisions of the Fifth Circuit as well as other Federal Courts of Appeal.)

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No.

IN THE

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TRUDIE P. WESTMORELAND,
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United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

The Petitioner, Trudie P. Westmoreland, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, Cause No. 87-4515, slip Opinion at 2647, officially reported as *United States v. Westmoreland,* ____ F.2d ____ (5th Cir. 1988), handed down by the United States Court of appeals for the Fifth Circuit on March 23, 1988. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is appended, bound in the Appendix and marked as Exhibit "A".

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Section 666(b) of Title 18 of the United States Code requires a misuse of Federal funds and a taking in excess of $5,000.00 and further, whether the ambiguity of the statute renders it unconstitutional. (This is an important question of federal law which has not been, but should be, settled by this Court.)

2. Whether rebuttal testimony offered by the government of an "on-going investigation" of alleged prior misconduct on the part of a Defendant is admissible. (The decision rendered by the Fifth Circuit Court of Appeals is in conflict with a decision of another Federal Court of Appeals on the same issue.)

3. Whether hearsay evidence is admissible as proof of predisposition and whether evidence to prove guilt by association is harmless error. (The Lower Court of Appeals rendered a decision on this point which is in conflict with previous decisions of the Fifth Circuit as well as other Federal Courts of Appeal.)

REFERENCE TO OPINIONS

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit from which this appeal is taken is bound and marked in the Appendix as Exhibit "A". In addition the Motion to Dismiss the indictment filed in the District Court and the Order entered thereon is also included in said Appendix and marked as Exhibit "B" and Exhibit "C". Relevant portions of testimony are attached to the Appendix as Exhibits "D" and "E".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1988. Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1254. Jurisdiction was vested in the Court of Appeals for the Fifth Circuit by virtue of Title 23 U.S.C. Section 1291.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions which are relevant to the decision of this case are the Fifth and Sixth Amendments of the United States Constitution.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against themselves, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 666 of Title 18 of the United States Code provides as follows:

(a) Whoever, being an agent of an organization, or a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or other form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000.00 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000.00 or an amount equal to twice that which was obtained in violation of this subsection, which ever is greater, or both so imprisoned and fined.

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or oganization other than his employer or principal for or because of recipients conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than 10 years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined."

STATEMENT OF THE CASE

Petitioner, Trudie P. Westmoreland, was indicted by the Federal Grand Jury on March 9, 1987 in the Southern District of Mississippi for the alleged crimes of bribery, mail fraud, extortion and aiding and abetting an offense against the United States during the time that she was serving as Supervisor of Perry County, Mississippi. Motion to Dismiss the Indictment was filed April 6, 1987. An Amended Motion to Dismiss was filed on April 28, 1987 and without hearing, the Motion was overruled.

The Government's case hinged upon the testimony of Government Agent Jerry King who posed as a salesman for Mid-State Pipe and Supply Company in an effort to engage Westmoreland as Supervisor of Perry County, Mississippi, in an illicit kickback scheme as part of an overall sting operation called "Operation Pretense". Westmoreland relied upon the defense of entrapment. She had been a Supervisor approximately two months before being approached by Agent King.

During the trial, testimony was elicited by the government regarding another indicted supervisor named Junie Mixon and over continuous timely objection of defense counsel, evidence was introduced to show that Mixon was a friend of Petitioner Westmoreland and that Mixon took kickbacks. Agent King was allowed to testify that Mixon (allegedly) insinuated that Petitioner Westmoreland would take kickbacks, although defense counsel objected on the grounds of hearsay. The Government was allowed to introduce evidence that Supervisor Mixon wrongfully used County funds to pave a private road to his residence.

The Government, in rebuttal, called an auditor from the State of Mississippi who testified that an on-going investigation was being conducted regarding Petitioner Westmoreland's financial records during her administration as Justice Court Judge four to six years prior in time to the trial and she alleged thousands of

dollars were unaccounted. She admitted the audit was incomplete and Petitioner had not been formally notified, charged or given the opportunity to respond to those charges.

On June 2, 1987, the jury convicted Westmoreland on all six counts of the indictment. Petitioner thereafter timely filed a Motion for Arrest of Judgment and a Motion for Judgment of Acquittal or in the alternative, a Motion for New Trial which was overruled by the District Court on July 6, 1987. Westmoreland's Notice of Appeal to the Court of Appeals for the Fifth Circuit was entered on the 6th day of July 1987 and a decision was rendered by this Court on March 23, 1988.

The questions addressed by the Fifth Circuit Court of Appeals, which are likewise to be addressed in the instant Appeal, concern jurisdiction and constitutionality of Section 666(b) of Title 18 of the United States Code; the admissibility of an ongoing incomplete investigation concerning remote prior misconduct of Petitioner as rebuttal evidence; and the admissibility of hearsay testimony to prove predisposition and guilt by association. The latter two issues were raised only at trial when the evidence was sought to be introduced by the government. However, the jurisdictional issue under Section 666(b) of Title 18 of the United States Code was initially addressed in the Motion to Dismiss and was passed on by the District Court and the Order, which are both attached to the Appendix as Exhibits "B" and "C".

ARGUMENT FOR GRANTING THE WRIT

Petitioner believes this case furnishes the Court distinct and important federal issues not yet settled and which must be resolved in order to protect the constitutional rights of the Petitioner herein and others similarly situated in this Sting Operation. It further involves rulings made by the Fifth Circuit in direct conflict with previous decisions and decisions of other circuits.

The Petitioner in Point I asserts that Section 666(b) of Title 18 of the United States Code entitled "Theft or Bribery Concerning Federal Programs Receiving Federal Funds" requires a tracing of federal funds and must involve a bribery of more than $5,000.00. It is undisputed that Petitioner received less than $5,000.00 and none of the transactions involved federal funds.

The Legislative history of this new statute indicates that it was created to establish new offenses to assist the United States in the vindication of *significant* acts of theft, fraud, and bribery involving *federal* funds that are disbursed to private organizations or State or local governments pursuant to a federal program. The Court of Appeals for the Fifth Circuit in this case of first impression has ruled that the statute does not require involvement of federal funds; that the United States was not required to trace federal funds to the charged transactions (only State funds were utilized here); and the Court did not directly address the question of whether or not the statute required a taking of at least $5,000.00. It is the position of the Petitioner that this is an *extremely* important question of federal law which has not been, but should be settled by this Court because of the precedent it will set for other cases which are bound to come. Furthermore, Petitioner believes that the statute itself is unconstitutionally vague and ambiguous in that it is capable of more than one interpretation and should in any event be resolved in Petitioner's favor.

Point II of Petitioner's Argument addresses an issue concerning rebuttal testimony offered by the Government concerning an "on-going investigation". See Appendix Exhibit "D". The Fifth Circuit Court of Appeals held that even though a State Auditor's Investigation had not been completed it was admissible as rebuttal testimony. This position is in direct conflict with the decision of the Court of Appeals in the Tenth Circuit in *United States v. Biswell,* 700 F.2d 1310 (10th Cir. 1983) which held that rebuttal testimony regarding "on-going investigations" is inadmissible evidence prohibited by Rule 404(a) of the Federal Rules of Evidence.

Point III of Petitioner's Argument involves the introduction of hearsay evidence as proof of predisposition and the introduction of evidence to prove guilt by association. See Appendix Exhibit "E". During Westmoreland's trial, FBI Agent King was allowed to give hearsay testimony of what another indicted Supervisor told him concerning Westmoreland. The testimony was submitted by the government under the guise of proof of predisposition. Mixon was not a witness at the trial and therefore Petitioner was denied her constitutional right to confront and examine all witnesses against her. The Court of Appeals held that the evidence concerning Supervisor Mixon was admissible. Petitioner believes the ruling is in direct conflict with previous decisions rendered by the Court of Appeals for the Fifth Circuit which have consistently held that guilt by association evidence will not be tolerated and hearsay evidence will not be admitted to prove disposition.

ARGUMENT

I.

THE LOWER COURT OF APPEALS ERRED IN FINDING THAT THE DISTRICT COURT HAD JURISDICTION UNDER SECTION 666(b) OF TITLE 18 OF THE UNITED STATES CODE WITHOUT THE REQUISITE USE OF FEDERAL FUNDS AND WITHOUT A BRIBERY IN EXCESS OF $5,000.00.

Section 666 of Title 18 of the United States Code is entitled "Theft or Bribery Concerning Programs Receiving Federal Funds" and states as follows:

> (a) Whoever, being an agent of an organization, or a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or other form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000.00 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000.00 or an amount equal to twice that which was obtained in violation of this subsection whichever is greater, or both so imprisoned and fined.
>
> (b) Whoever, being an agent of an organization, or of the State of local government agency described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of recipients conduct in any transaction or matter or a series of transactions or matters involving $5,000.00 or more concerning the affairs

> of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000.00 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater or both so imprisoned and fined.

The Fifth Circuit Court of Appeals held that the Federal Statute did not require direct involvement of Federal funds in the allegedly corrupt transactions nor was the Government required to trace Federal funds to the tainted transactions. It further found the statute to be unambiguous.

Petitioner asserts that this statute was never intended to reach the factual situation in the case at bar. It is undisputed that counties of Mississippi receive Federal assistance. However, it is equally undisputed, that there were no Federal funds utilized in any of the transactions and further that the amount Petitioner received by virtue of the "bribery" was only approximately $2,000.00. Therefore, this Court, as was pointed out to the Fifth Circuit Court of Appeals by the Petitioner, is confronted with a defendant who allegedly obtained less than $5,000.00 of State, not Federal funds. The United States does not have oversight jurisdiction of State funds.

The Fifth Circuit Court of Appeals relied heavily upon *United States v. Smith,* 659 F. Supp. 833 (S.D. Miss. 1987) where United States District Judge, Honorable William Barbour, found that Section 666(b) of Title 18 of the United States Code only required that $10,000.00 of Federal funds be provided to a given county and that $5,000.00 of funds be involved in the series of transactions charged (whether or not the funds involved were in fact federal and whether or not more than $5,000.00 was received by the person charged). Petitioner respectfully submits that this interpretation, accepted by the Fifth Circuit Court of Appeals in the Westmoreland decision, is in error.

Section 666 of Title 18 of the United States Code was adopted on October 12, 1983 and created a new category of federal crimes for theft or bribery concerning programs receiving federal funds. The section was added in the enactment of Public Law 98-8-473, part (C) which sets forth that the new category of federal crimes was intended to apply only to *federal* monies. Page 369 of Public Law 98-463, part (C) makes it clear that this part of Title XI was created to establish new offenses to assist the United States in the vindication of significant acts of theft, fraud and bribery involving *federal* monies that are disbursed to private organizations or State and local governments pursuant to a federal program.

The title of the statute and the legislative history reveal the intent of Congress to reach only "significant acts of theft, fraud, and bribery involving *federal* monies. The legislative history further reveals that it was the intent of Congress to reach thefts and briberies in situations of the type found in *United States v. Deltoro,* 513 F.2d 656 (2nd Cir. 1975); *United States v. Hinton,* 683 F.2d 195 (7th Cir. 1982); *United States v. Moseley,* 659 F.2d 812 (7th Cir. 1981). See 4 *U.S. Congressional and Administrative News,* 3510 (1984). All of these cases involved the use of federal funds in various schemes of bribery. None of these cases involved the use of State or local funds in bribery schemes comparable to that alleged in the indictment exhibited against the Petitioner.

In 1984 *U.S. Congressional and Administrative News,* page 3511, Section 666 was discussed as follows:

> "Part (C) adds a new Section 666 to Title 18, United States Code. Subsection (a) makes it a federal crime for an officer, employee or agent of an organization or of a State or local government agency that receives benefits in excess of $10,000.00 per calendar year pursuant to a federal program to *steal, embezzle, obtain by fraud, willfully misapply or otherwise knowingly convert without authority pro-*

> *perty valued at $5,000.00, or more...* the committee intends that the term 'federal program involving a grant, a contract, a subsidy, a loan, a guaranty, insurance, or other form of federal assistance' be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through federal programs from theft, fraud and undue influence by *bribery*. However the concept is not unlimited. The term 'federal program' means that there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000.00 in equipment from a supplier, *it is not the intent of this section to make a theft of $5,000.00 or more, from the supplier a federal crime.* It is, however the intent to reach the thefts and bribery in those situations of the types involved in the *Deltoro, Hinton* and *Moseley* cases cited herein." (Emphasis added).

This clearly outlines the intent of Congress to cover thefts of property "valued at $5,000.00 or more" and does not contemplate nonsignificant thefts of less than $5,000.00. The instant case and many of the supervisor cases arising out of "Operation Pretense" involve thefts or bribery of less than $5,000.00.

It is necessary that this Court make note of the fact that the funds involved in the case at bar had nothing to do with the federal funds received by Perry County which were Federal Revenue Sharing Funds and which were maintained separately in a fund account in accordance with 331 C.F.R. 51.101(a), (b), (c). This is undisputed. The Government's contention, however, is that the series of transactions can be combined to reach the $5,000.00 mark and that it is unnecessary to show that the Petitioner actually received $5,000.00 or more. In addition, it is the Government's position that no tracing of federal funds

to the charged transactions is necessary. This position, which was accepted by the Fifth Circuit Court of Appeals is directly contrary to congressional intent outlined in 4 *U. S. Congressional and Administrative News,* 3510-3511, (1984).

It is furthermore the belief of Petitioner that the statute is so vague and ambiguous that it does not meet constitutional muster. Paragraph (a) clearly requires the conversion of $5,000.00 or more. We believe (b) also requires the conversion of $5,000.00 or more because of congressional intent but the language of the statute itself is at the very least capable of two interpretations. Petitioner argues that the requisite amount of $5,000.00 refers to the property taken and cannot consist of smaller transactions added together as proposed by the government. This equally suggests that the language of the statute gives rise to more than one interpretation and the very fact that the statute can be construed in more ways than one places a constitutional shadow over this conviction. *Vicksburg Fire Fighters Association v. City of Vicksburg,* 761 F.2d 1036, footnote 7 (5th Cir. 1985).

A strict standard should be applied in the review of criminal statutes for vagueness. *United States v. Articles of Drug et al,* 825 F.2d 1238 (8th Cir. 1987). One District Court Judge has already found in the case of *United States v. Jackowe,* 651 F.Supp. 1035 (S.D.N.Y. 1987), although factually distinguishable, that Section 666 of Title 18 of United States Code is capable of two constructions and therefore should be construed against the government in accordance with *United States v. Barquin,* 799 F.2d 619 (10th Cir. 1986).

Even if this Honorable Court should find that the statute is constitutional in and of itself, the ambiguity arising therefrom should most definitely be resolved in favor of the rule of leniency which is based upon due process principles and which requires that no person have to speculate at whether or not conduct is prohibited. *Gunn v. United States,* 442 U.S. 100, 60

L.Ed.2d 743, 99 S.Ct. 2190 (1979); *United States v. Bass,* 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971); *United States v. Enmons,* 410 U.S. 396, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973); *Rues v. United States,* 401 U.S. 808, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971). All of these cases involved the Governments attempt to give an expansive interpretation to a statute and all were resolved in favor of the Defendant. Petitioner Westmoreland submits that Section 666 of Title 18 of the United States Code is *not* clear and, therefore, the legislative history must be considered. The history reveals the intention of Congress to reach crimes involving Federal monies, not State funds, and bribery or takings of $5,000.00 or more and not less. The case at bar involves State funds and a taking of merely $2,000.00 and therefore the decision of the Fifth Circuit Court of Appeals upholding Westmoreland's conviction should be reversed.

II.

REBUTTAL TESTIMONY REGARDING AN "ONGOING INVESTIGATION" OF PRIOR MISCONDUCT IS INADMISSIBLE AS A VIOLATION OF RULE 404(a) OF THE FEDERAL RULES OF EVIDENCE.

A rebuttal government witness, an investigative auditor of the State of Mississippi, testified that she was conducting an ongoing investigation which was not complete but which had allegedly revealed that Petitioner Westmoreland had approximately $9,000.00 in unaccounted funds from her term as Justice Court Judge four to six years before the trial of the matter at bar. Relevant portions of her testimony are attached to the Appendix as Exhibit "D". The Fifth Circuit Court of Appeals held that even though the investigation had not been completed, the testimony was admissible. That decision flies in the face of the decision rendered by the Court of Appeals for the Tenth Circuit in *United States v. Biswell,* 700 F.2d 1310 (1983)

which held that evidence of an "on-going investigation" was in violation of Rule 404(a) as an attempt to show that a Defendant acted in conformity with a criminal character.

In the case at bar Patterson, the Auditor for the State of Mississippi, testified regarding her on-going investigation and further stated that the petitioner would not have the oppertunity to rebut such a charge until the investigation was complete and she had been sent a letter setting forth the findings. Mrs. Patterson further testified that many times findings, such as hers, could be explained or answered satisfactorily by the person charged and a that the discrepancies complained of occurred from four to six years before. The evidence of this incomplete investigation did not constitute *clear* and *convincing evidence* of other crimes reasonably close in time to that charged at trial. See *United States v. Gustafson*, 728 F.2d 1078 (8th Cir.), *cert denied* 469 U.S. 979 (1984).

In *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983) a defendant was charged with the unauthorized use, acquisition and posession of food stamps. During the trial Federal agents and witnesses were allowed to testify that there were on-going investigations concerning the Defendant's possession of stolen property. The Tenth Circuit Court of Appeals stated as follows:

> "Thus, at different times repeated references were made connecting Biswell with 'on-going investigations' with being 'handled' for possessing stolen property with 'gambling, stolen property, things like that . . .' and he was by implication placed in a group 'involved in some kind of criminal activity' . . ."
>
> "We are convinced that the overall effect of such evidence was to create a prejudicial portrayal of the defendant as a person of a criminal character with a trait of taking part in general criminal activities for an undefined period. For reasons that follow we must hold that admission of such

vague and prejudicial evidence was not justified under Rule 404(b), but was in violation of Rule 404(a) by attempting to show that defendant acted in conformity with a criminal character. In any event, the relevance of any part of such evidence was substantially outweighed by the danger of unfair prejudice when such a vague protrayal of a long term criminal character was injected, and should have been excluded under Rule 403." Id at 1316.

The Court went on to state as follows:

"From the totality of the evidence interjected by the government we are convinced that the admission of the evidence of other crimes, wrongs and misconduct here was prejudicial error. First, we are not dealing with proof clearly establishing an identified, reasonably recent offense of receiving stolen goods, or with any reasonably recent conviction of such an offense. As noted, the evidence was of the most damning sort - referring to "on-going investigations' persons 'involved in the criminal activity' in a general smear of the defendant for participating in 'gambling, stolen property, things like that' . . . the governments approach did not permit any effort by the defendant to meet charges of specific misconduct at any particular time; it could be met only by a general denial and evidence of good character. Moreover the vagueness of the testimony made its reliability questionable and diminished its probative value." Id at 1318.

Like *Biswell*, supra, the testimony in the case at bar was character evidence interjected to prove that Westmoreland had acted in conformity with her criminal character, which is prohibited by Rule 404(a) of the Federal Rules of Evidence. Westmoreland was not given an opportunity to meet these charges and like *Biswell*, supra, all she could do was to rely on her evidence of good character and a general denial of any wrongdoing. The evidence introduced had no relevance to the offense tried, and its predominant quality was to show Defendant's character as a misuser of public funds.

Petitioner respectfully submits that Rule 404(b) of the Federal Rules of Evidence was never intended to allow remote evidence of the kind introduced. There is no doubt it was introduced, in the Government's own words, to show the Defendant's intent to commit the crimes charged in the indictment. The Government wrongfully attempted to show that this Defendant acted in conformance with alleged past criminal behavior. The Fifth Circuit Court of Appeals found that this was acceptable. The Tenth Circuit Court of Appeals in *Biswell*, supra, found that it was not acceptable. Westmoreland believes the Tenth Circuit rendered the correct decision in *Biswell*.

The overwhelming prejudicial nature of testimony concerning "on-going investigations" of prior misconduct is alarming and certainly overcomes any probative value of such testimony. The truth of this type prejudice is revealed where the Government rebuttal witness testified that many times the findings of these on-going investigations can be explained or answered satisfactorily after a party has been formally presented with the report. Petitioner believes that Rule 404(b) was never intended as a carte blanche rubber stamped "okay" on extremely prejudicial evidence with questionable reliability. The Fifth Circuit Court of Appeals itself has held again and again that such testimony should be excluded by a trial court when its value is outweighed by unfair prejudice to the Defendant. *United States v. Johnson*, 542 F.2d 230 (5th Cir. 1976). The prejudice created by Ms. Patterson's testimony of this incomplete and on-going investigation was insurmountable and it should be pointed out that her records changed even during the short time of trial and were still incomplete at the end of trial. Petitioner could not combat the prejudice of this incomplete report and we assure this Court that it brought about Petitioner's prompt conviction, denying her the fair trial to which she was entitled.

III.

HEARSAY EVIDENCE IS NOT ADMISSIBLE TO PROVE PREDISPOSITION AND EVIDENCE TO PROVE GUILT BY ASSOCIATION IS NOT ADMISSIBLE

In the trial before the District Court Judge, Government Agent King gave hearsay testimony of what another indicted Supervisor, Junie Mixon, told him concerning Westmoreland. The testimony was submitted by the Government as proof of predisposition and was an attempt to associate Westmoreland with a friend who had also been indicted and, according to the testimony, had accepted kickbacks. The prejudice created by this testimony was compounded when evidence was admitted of extreme extraneous crimes committed by Supervisor Junie Mixon which had nothing to do with the charges against the Petitioner. The Government was allowed over timely objection to question character witnesses of Petitioner regarding whether or not Supervisor Mixon had paid for the paving of a private road to his residence or whether he had misused County funds to obtain the same. Relevant portions of this testimony are attached to the Appendix as Exhibit "E".

Petitioner argues that she was denied her Sixth Amendment Right to confront all witnesses used against her. Supervisor Mixon was an indicted Supervisor who was not available for trial and who was used, through hearsay, as a witness against her. In the United Supreme Court case of *Moore v. United States*, 429 U.S. 21, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) police officers testified as to what an informant had said about Moore's possession of drugs and ownership of an apartment. This hearsay testimony was the only testimony offered regarding the Defendant's living in the apartment that was in question. This Honorable Court found that introduction of that testimony deprived Moore of his right to cross-examine a crucial witness. Therefore the judgment of the Court of Appeals was vacated and the case remanded.

In the case at bar the hearsay evidence regarding Mixon deprived Westmoreland of her right to cross-examine Mixon and this hearsay evidence was the only evidence offered by the Government to show predisposition without which the jury would have had to find entrapment. It should not have been admitted.

Testimony was elicited by the Government to show that Mr. Mixon and Westmoreland were good friends, setting the stage for the "guilt by association". Testimony was further elicited to show that Mr. Mixon had been accepting kickbacks over the constant objection of Petitioner's counsel who stated that the Government was attempting to bring in other crimes committed by other people into the trial against Westmoreland. Furthermore FBI Agent King was allowed to testify about a conversation he had allegedly had with Supervisor Mixon during which Mixon allegedly told Agent King that Westmoreland was willing to do a wrong. The Fifth Circuit Court of Appeals said that the admission of this evidence caused it "some concern" but was not reversible error. This is in direct conflict of previous decisions rendered by the Fifth Circuit Court of Appeals which have held: (1) hearsay evidence cannot be used to prove predisposition, *United States v. Webster*, 649 F.2d 346 (5th Cir. 1981); and (2) the Government will not be allowed to taint a Defendant's character through "guilt by association". *United States v. Escamilla*, 666 F.2d 126 (5th Cir. 1982); *United States v. Ochoa*, 609 F.2d 198 (5th Cir. 1980); *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982); *United States v. LaBarbera*, 581 F.2d 107 (5th Cir. 1978).

In *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982), the Fifth Circuit condemned the very same type of testimony which was allowed in the case at bar. *Romo*, supra, was a prosecution for possession of cocaine and conspiracy to possess with intent to distribute. During the trial, evidence was admitted concerning the drug convictions of two persons whom Defendant had previous contact. The Fifth Circuit Court of Appeals found

that such evidence was irrelevant and highly prejudicial and was offered merely as an attempt to taint the Defendant's character through "guilt by association". This ruling is extremely important when considering that the Government in the *Romo*, supra, case argued that the testimony was admissible to rebut Defendant's portrayal of himself as an honest businessman. This was precisely the position of the Government in the case at bar which was trying to combat Westmoreland's character witnesses who portrayed her as an honest business woman. Petitioner submits that the "guilt by association" testimony concerning extraneous crimes committed by Supervisor Mixon, an associate, created such prejudicial error that this Honorable Court should reverse her conviction or at the very least grant a new trial. Petitioner urges this Honorable Court to review *Romo*, supra, in its entirety. It was ultimately reversed because of the Trial Court's erroneous admission of testimony based on "guilt by association" and is very similar to the case at bar.

The case of *United States v. LaBarbera*, 581 F.2d 107 (5th Cir. 1978) is another example of the Fifth Circuit's condemnation of a prosecutor's attempt to taint a Defendant's character through "guilt by association". In that case testimony was admitted regarding whether or not the son of a defendant had been arrested for possession of stolen guns and this Honorable Court stated as follows:

> "A conviction of defendant's son on that charge was irrevelant to any issue in this case, let alone a mere arrest. This was a highly prejudicial attempt to taint defendant's character through "guilt by association'." Id. at 109.

The outrageous attempt by the Government in this case at bar, condoned by the Lower Court, is almost identical. Supervisor Junie Mixon had not been convicted of anything. He had been arrested for offenses similar to that charged in the indictment against Westmoreland, but Petitioner has no knowledge that Mixon had even been confronted with any misuse of funds

in the building of the road which led to his house. The only reason the Government attempted to elicit testimony regarding that extraneous matter was to taint the Petitioner's character through "guilt by association".

CONCLUSION

Petitioner respectfully submits that the case at bar does not fall within the purview of Section 666(b) of Title 18 of the United States Code since it in no way involves Federal funds and did not consist of a taking by the Petitioner of $5,000.00 or more.

Petitioner further submits that the rebuttal testimony offered by the Government of "on-going investigations" of the Petitioner's alleged remote prior misconduct during her administration as Justice Court Judge was inadmissible as an attempt to show Defendant acted in conformity with a criminal character in violation of Rule 404(a) of the Federal Rules of Evidence.

Finally Petitioner submits that the hearsay evidence offered by Government Agent King as proof of predisposition was inadmissible and did not constitute harmless error when coupled with the evidence associating Petitioner with another allegedly guilty supervisor. The admission of this testimony denied Petitioner the right to confront all witnesses used against her and denied her the fair trial to which she was entitled.

For all of the reasons cited herein and upon a review of the record and the Appendix submitted herewith, Petitioner verily believes that this Petition for Writ of Certiorari should be granted, and the judgment of the Lower Court and the Fifth Circuit of Appeals which affirmed the convictions of Petitioner should be set aside and the judgment of conviction be reversed.

Respectfully submitted,
TRUDIE P. WESTMORELAND

BY: _____
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CERTIFICATE OF SERVICE

I, Alvin M. Binder, attorney of record for the Petitioner, Trudie P. Westmoreland, do hereby certify that I have this day forwarded by the United States Mail, postage prepaid, a true and correct copy of the above and foregoing Petitioner's Petition for Writ of Certiorari to Honorable Charles Freed, Solicitor General of the United States Department of Justice, Washington, D.C. 20530.

This the 18th day of May, 1988.

_____

ALVIN M. BINDER

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1910

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TRUDIE P. WESTMORELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

By Petitioner, Trudie P. Westmoreland

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APPENDIX

EXHIBIT "A" OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EXHIBIT "B" AMENDED MOTION TO DISMISS INDICTMENT

EXHIBIT "C" ORDER ON MOTIONS

EXHIBIT "D" TESTIMONY OF SHEILA PATTERSON -REGARDING TESTIMONY OFFERED BY THE GOVERNMENT CONCERNING AN "ONGOING INVESTIGATION"

EXHIBIT "E" TESTIMONY OF RAY DAVIS AND TESTIMONY OF JERRY KING -REGARDING HEARSAY EVIDENCE AS PROOF OF PREDISPOSITION

TESTIMONY OF LAWRENCE W. WARREN CHARACTER WITNESS QUESTIONED REGARDING MIXON'S MISUSE OF COUNTY FUNDS TO PAVE PRIVATE ROAD

EXHIBIT "A"

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Trudie P. Westmoreland,
Defendant-Appellant.

No. 87-4515.

United States Court of Appeals, Fifth Circuit.

March 23, 1988.

Defendant was convicted in the United States District Court for the Southern District of Mississippi, Tom S. Lee, J., of bribery, extortion, and mail fraud, and she appealed. The Court of Appeals, King, Circuit Judge, held that: (1) federal statute prohibiting theft or bribery concerning programs receiving federal funds does not require direct involvement of federal funds in allegedly corrupt transaction; (2) testimony of state investigative auditor concerning discrepancies in defendant's financial records from her prior term as justice court was admissible; and (3) evidence established that defendant was predisposed to take kickbacks in purchase of county material and was not entrapped into committing charged crimes.

Affirmed.

Appeal from the United States District Court for the Southern District of Mississippi.

Before RUBIN, KING, and WILLIAMS, Circuit Judges.

KING, Circuit Judge:

A county supervisor appeals her convictions for bribery, extortion, and mail fraud because she took kickbacks in purchases

of county materials. She asserts that a federal statute prohibiting theft or bribery concerning federally funded programs does not apply to cases involving only state funds, that the district court wrongly admitted unduly prejudicial evidence, that the government's proof of her criminal predisposition failed to overcome her entrapment defense, and that there was insufficient evidence of extortion and mail fraud. We conclude that none of these arguments warrants reversal of the convictions.

I.

Trudie P. Westmoreland ("Westmoreland") became a county supervisor in Perry County, Mississippi, on November 20, 1985. As a county supervisor, Westmoreland had authority to purchase materials for the county in order to maintain its roads and bridges in her district. On February 5, 1986, an undercover agent of the Federal Bureau of Investigation, Jerry King ("Agent King") approached Westmoreland posing as a salesman for Mid-State Pipe and Supply Company. At their first meeting, Westmoreland ordered materials from Agent King and accepted $760 in cash from him. Agent King tape recorded the transaction and further transactions in which Westmoreland approved fraudulent invoices in exchange for cash kickbacks. Shortly after Westmoreland's initial contact with Agent King, she also accepted kickbacks from Ray Davis, a local chemical salesman, in connection with purchases of supplies for the county. The venders' invoices and the county's checks for payment were exchanged by mail. Westmoreland received a total of $1702 from Agent King, which she admitted but claimed was a result of entrapment, and $500 from Ray Davis, which she denied.

On March 7, 1987, a grand jury issued a six count indictment against Westmoreland charging her with bribery, 18 U.S.C. § 666(b); mail fraud, 18 U.S.C. § 1341; extortion, 18 U.S.C. § 1951(a); and aiding and abetting an offense against the United

States, 18 U.S.C. § 2. During a jury trial, the government introduced testimony by Agent King and Ray Davis, the tape recordings and transcripts of their contents, and copies of the documents involved in the sales transactions. In addition to eliciting testimony concerning Westmoreland's misconduct, the prosecutor questioned witnesses about another county supervisor and a friend of Westmoreland's, Junie Mixon, who was also indicted for taking kickbacks. In rebuttal to Westmoreland's entrapment defense, the prosecutor also offered the testimony of a state auditor concerning an investigation of Westmoreland's financial records from her prior term as a justice court judge that indicated a discrepancy of county funds. The jury returned guilty verdicts on all counts of the indictment, and after the district court denied Westmoreland's motion for a judgment of acquittal or, alternatively, a new trial, she timely appealed.

On appeal, Westmoreland raises six points of error. First, she contends that the district court lacked jurisdiction over the bribery charge because, in her view, the relevant federal statute (section 666) reaches only significant acts of bribery involving federal funds and the government did not allege or prove that the bribery scheme used federal monies. Second, she asserts that the district court should have excluded the rebuttal testimony concerning another instance where she allegedly misappropriated county funds because the prejudicial effect outweighed any probative value. Third, Westmoreland argues that her convictions resulted from "guilt by association" because the jury heard evidence about her relationship with another county supervisor and his alleged misconduct. Fourth, she contends that the government failed to prove predisposition beyond a reasonable doubt and thus her entrapment defense entitled her to acquittals of the crimes that involved Agent King. Finally, in her fifth and sixth arguments, Westmoreland contends that the evidence was insufficient to sustain her convictions for extortion and mail fraud. We view these arguments as raising three types of issues-statutory interpretation, ad-

missibility of evidence, and sufficiency of proof-and we address them accordingly below.

II.

A. The Scope of Section 666

[1] Section 666 of Title 18, United States Code, prohibits theft or bribery concerning programs receiving federal funds. As originally enacted, subsection (b) provides:

> Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

18 U.S.C. § 666(b)(Supp. 1984). Subsection(a) of the original statute describes an organization or a state or local government agency "that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance." 18 U.S.C. § 666(a)(Supp.1984).

The indictment against Westmoreland follows the statutory language and alleges that she acted as an agent of Perry County, a local government agency that received benefits in excess of $10,000 in a one year period under a federal program providing federal assistance to the county, and that she knowingly and willfully accepted cash in the sum of $2,202 from persons other than her employer because of her conduct in transactions or a

series of transactions involving $5,000 or more concerning the affairs of the county. The government's evidence at trial indicates that, during a one year period while Westmoreland served as a county supervisor and allegedly committed the illegal acts, Perry County received federal revenue sharing funds totaling $222,949.00 and allocated $36,391.55 of those funds to her district. Evidence of the sales transactions associated with the alleged bribes shows that Westmoreland authorized, and the county paid, a total of $14,482.92 for the purchased goods.

Westmoreland contends, however, that the government's allegations and subsequent proof were insufficient to satisfy the jurisdictional amounts contained in the statute. Specifically, she argues that the statute requires the involvement of $5,000 of federal, not merely general, funds in the allegedly corrupt transactions. In urging this interpretation, Westmoreland quotes legislative history which states that the statute was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S.Rep. No. 225, 98th Cong., 2d Sess. 369, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3510. From this statement, Westmoreland concludes that Congress intended to reach bribery schemes involving federal rather than state funds, and she argues that, because the federal revenue sharing funds received by Perry County were segregated and not expended for the types of purchases she made, the alleged acts of bribery concerned only state monies and did not fall within the purview of the statute.[1] In Westmoreland's view, sufficient statutory am-

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[1] In this regard, Westmoreland also suggests in her reply brief that, because the county's method of purchasing materials for road maintenance does not use federal revenue sharing funds, this particular county program does not receive federal funds. She argues that the county's receipt of general assistance funds for other uses should not confer federal jurisdiction over state crimes. To the extent that Westmoreland's argument introduces the concept of a local government program (as opposed to a local government agency) that the statute does not contain, we see no need to address it.

biguity exists to invoke the rule of strict construction applicable to criminal statutes and the rule that congressional intent, as evidenced by the legislative history, controls.[2] Under her interpretation, derived from these principles and applied to the facts of this case, the government must show that the allegedly corrupt sales transactions involved $5,000 of the county's federal revenue sharing funds, not merely $5,000 of any funds.

The district court rejected Westmoreland's statutory interpretation, and although the district court's decision of law is freely reviewable, we do likewise. The issue presented by Westmoreland's argument is whether section 666(b) requires the government to trace federal funds to the tainted transactions of a local government agency covered by the statute. Despite Westmoreland's protestations, we find the relevant statutory language plain and unambiguous. By the terms of section 666, when a local government agency receives an annual benefit of more than $10,000 under a federal assistance program, its agents are governed by the statute, and an agent violates subsection (b) when he engages in the prohibited conduct "in *any* transaction or matter or series of transactions or matters involving $5,000 or more concerning the affairs of" the local government agency. 18 U.S.C. § 666(b)(Supp. 1984)(emphasis added). Subsection (b) contains nothing to indicate that "any transaction involving $5,000" means "any federally funded transaction involving $5,000" or "any transaction involving $5,000 of

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[2] Westmoreland asserts that section 666 is ambiguous in the following respects: whether subsection (b), like subsection (a), requires a taking of $5,000 and thus means that the bribes, rather than the related transactions, must equal the $5,000 amount; whether small transactions added together may satisfy the amount; and whether the amount must consist of some federal funds. She does not explain what creates the first two ambiguities, nor does she urge us to adopt an interpretation concerning them. Thus we do not pursue them in our analysis. Concerning the third alleged ambiguity, we assume that it underlies her main argument-that federal funds must be traced to the allegedly corrupt transactions.

federal funds," and other subsections of the statute contain no inconsistent provisions that might suggest such a qualification.

Lower courts have similarly found section 666 to be ambiguous in its application. *See United States v. Smith*, 659 F.Supp. 833, 834-35 (S.D.Miss. 1987)("The language in Section 666 is clear that it is not an essential element of this crime [bribery] that the government trace the $5,000 to specific federal government funds."); *see also United States v. Sadlier*, 649 F.Supp. 1560, 1564 (D.Mass. 1986). Although Westmoreland cites one case where a district court found section 666(b) unclear, the issue presented was the requisite element of intent, and we view any ambiguity in that regard as irrelevant to our decision. *See United States v. Jackowe*, 651 F.Supp. 1035, 1036 (S.D.N.Y. 1987). Similarly, the Tenth Circuit applied the rule of strict construction in *United States v. Barquin*, 799 F.2d 619 (10th Cir. 1986), because it concluded that an Indian tribe or its business council did not fit within the plain meaning of the term "local government agency" as defined by section 666, a definition unrelated to the issue before us.

"Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify departure from that language." *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct.2897, 2902, 86 L.Ed.2d 536 (1985)(citations omitted)(quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984)). Thus we turn to the legislative history "as an additional tool of analysis" with the recognition that our inquiry will result in "a limitation on the 'plain meaning' of the statutory language" only under exceptional circumstances. *Garcia*, 469 U.S. at 75, 105 S.Ct. at 482. Examining the Senate Report on which Westmoreland relies, we conclude that the legislative history supports our interpretation of section 666 rather than negates it.

Senate Report 225 explains the Comprehensive Crime Control Act of 1984, which created section 666. The Report indicates that one of the purposes for enacting the new provisions in section 666 was to fill a gap caused by the difficulty of tracing federal monies. To explain the need for augmenting an existing section that punishes theft or embezzlement by officers and employees of agencies funded by a particular federal program, the Report states:

> [T]here is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. § 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.
>
> With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to Federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the Federal Government may be considered as a "public official" under the definition in 18 U.S.C. § 201(a) . . . .

S.Rep. No. 225, 98th Cong., 2d Sess. 369, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3510. In its continued

discussion of the inadequacies of the general bribery statute, the Report notes that the courts of appeals had reached different results in deciding whether a person employed by a private organization receiving federal monies was a "public official." *See* S.Rep. No. 225 at 369-70; 1984 U.S. Code Cong. & Admin. News at 3510-11 (comparing *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982) and *United States v. Mosley*, 659 F.2d 812 (7th Cir. 1981) with *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976) and *United States v. DelToro*, 513 F.2d 656 (2d Cir. 1975)). A review of the cited cases reveals that resolution of the question sometimes depended on the extent to which the person exerted federal authority and controlled the dispersal of federal funds. *See Hinton*, 683 F.2d at 198-200; *Mosley*, 659 F.2d at 815-16. Furthermore, the Report specifically states its intent "to reach thefts and bribery in situations of the types involved in *DelToro*" and other cases. S.Rep. No. 225 at 370; 1984 U.S. Code Cong. & Admin. News at 3511. In *DelToro*, an official of a federally funded program demanded a bribe to use his position to secure a lease of office space for the program from one of the defendants. At the time that the defendant partially paid the bribe, no commitment of federal funds for the new lease existed, although a subsequent funding request would have been made through a federal program. 513 F.2d at 662. Arguably however, Congress did not intend the involvement of federal funds in a corrupt transaction to be a factual certainty.

In short, while the legislative history manifests a congressional intent to preserve the integrity of federal funds, Congress specifically chose to do so by enacting a criminal statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds and control their administration. Westmoreland's interpretation, however, would produce both of those problems. Furthermore, the amended version of section 666 reinforces our interpretation. Although the amendment occurred after Westmoreland's alleged misconduct and did not affect her, its legislative history in-

dicates that the relevant changes were "technical" ones. *See* H.R.Rep. No. 797, 99th Cong., 2d Sess. 30, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6138, 6153. The pertinent part of section 666 now provides that an agent of a local government agency (that receives federal assistance as previously described) who "accepts or agrees to accept anything of value from any person, intending to be influenced or rewarded in connection with *any* business, transaction, or series of transactions of such . . . agency involving *anything* of value of $5,000 or more" shall be fined, imprisoned, or both. 18 U.S.C. § 666(a)(1)(B) (Supp. 1986) (emphasis added). As in the original statute, any reference to federal funds is conspicuously absent from the operative provisions, and it is clear that Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do.

In opposing an expansive interpretation, Westmoreland argues that the result extends federal power in a manner that, in many instances, the federal interest at stake does not warrant. Once Congress has spoken, however, we do not sit to judge the wisdom of its actions. It is suffcient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them. Moreover, the statute does not encompass every local bribery as Westmoreland suggests. Although the extent of the federal government's assistance programs will bring many organizations and agencies within the statute's scope, the statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions. In conclusion, then, the direct involvement of federal funds in a transaction is not an essential element of bribery under section 666(b); the government need not prove that federal monies funded a corrupt transaction.

B. The Admissibility of Prejudicial Evidence

Westmoreland contends that the district court erred in admitting two types of evidence: (1) evidence of her alleged miscon-

duct during a previous term of public office and (2) the "guilt by association" evidence concerning another county supervisor, Junie Mixon. The first, she argues, was inadmissible under Rule 404(b) of the Federal Rules of Evidence. Concerning the second, she argues that some of it was hearsay, some was irrelevant, and all was highly prejudicial. Where a party timely objects to the admission of evidence, we review the district court's ruling under an abuse of discretion standard. *See, e.g., United States v. Henthorn*, 815 F.2d 304, 308 (5th Cir. 1987); *Petty v. Ideco, Div. of Dresser Indus., Inc.*, 761 F.2d 1146, 1151 (5th Cir. 1985).

1. The Extrinsic Offense Evidence

[2] In *United States v. Beechum*, we outlined a two-step analysis to guide trial courts in determining the admissibility of evidence under Rule 404(b): "First, it must be determined that the extrinsic offense is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403." 582 F.2d 898, 911 (5th Cir. 1978)(enbanc). We further held, in *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983), that the district court must articulate its balancing judgment on the record when requested by a party. In this case, the government proffered the testimony of a state investigative auditor concerning discrepancies in Westmoreland's financial records from her prior term as justice court judge, and the district court thoroughly complied with the guidelines of *Beechum* and *Robinson*. The district judge's determination reflects a well-reasoned assessment of the factors of probativeness and prejudice underlying his decision, and we perceive no abuse of his discretion in admitting evidence.

Although Westmoreland obviously disagrees with the district court's judgment, her primary complaint is that, because the investigation was incomplete, she was unable to explain the

discrepancies or to answer any charges. Westmoreland urges us to follow the Tenth Circuit's dicision in *United States v. Biswell*, 700 F.2d 1310, 1318 (10th Cir. 1983), where the court held that, under the circumstances, evidence of "ongoing investigations" should have been excluded. Without expressing an opinion about *Biswell*, we reject Westmoreland's assertion that evidence of the uncompleted investigation here lacked probative value and overwhelmingly prejudiced her because she could not adequately respond. The evidence did not portray her as "taking part in general criminal activities for an undefined period." *Biswell*, 700 F.2d at 1316. Rather, the auditor's testimony was detailed and specific, and Westmoreland knew of the charges against her. A state auditor requested Westmoreland's financial records for the years in question when the investigation began; the government informed Westmoreland before trial that it might use the evidence; and she received copies of the auditor's worksheets at the start of the trial.

Moreover, Westmoreland's argument concerning probativeness actually challenges the reliability of the auditor's figures. Clearly, if the calculations were so erroneous that no discrepancy in fact existed, then the government failed to sufficiently prove that Westmoreland committed the alleged extrinsic offense-abuse of an elected office by misappropriating public funds-and the evidence would be irrelevant to show intent and predisposition, the purposes for which it was admitted. *See Beechum*, 582 F.2d at 912-13. However, "[t]he standard for the admissibility of extrinsic offence evidence is that of rule 104(b): 'the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist.' " *Id* at 913 (quoting 21 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5054, at 269 (1977)). In this case, the auditor admitted on cross-examination that Westmoreland might be able to resolve some of the discrepancy, but the auditor also testified that further investigation would probably increase the $9,506.95 figure derived from the completed portions of the audit. Thus the existence

of a discrepancy cannot seriously be questioned, and as stated earlier, we conclude that the district court did not abuse its discretion by admitting the auditor's testimony.

2. The Evidence Concerning Junie Mixon

[3] The district court admitted, over Westmoreland's objection, testimony by Agent King that a conversation with Junie Mixon led him to investigate Westmoreland because it indicated that she might be willing to accept kickbacks. Ray Davis and Agent King also testified, over objection, that they paid kickbacks to Junie Mixon. Ray Davis made this statement while explaining why he believed that Westmoreland would accept illegal payments and how he indirectly offered kickbacks to her by simply referring to his dealings with Junie Mixon; Agent King's statement occurred in the course of testifying how he initiated his investigation. Westmoreland also complains of the government's cross-examination of one of her character witnesses, a contractor who the government questioned about paving a road to Mixon's house; the government contends that it properly sought to impeach the witness by asking about a specific instance of misconduct. Westmoreland contends that evidence of Mixon's statements was hearsay and that evidence concerning Mixon's misconduct was irrelevant. She argues that the evidence was prejudicial because she was thus associated with Junie Mixon and his crimes. Westmoreland cites numerous cases where we have held that the admission of evidence concerning the crimes of a defendant's friends or relatives constituted reversible error because it resulted in "guilt by association." *See, e.g., United States v. Romo*, 669 F.2d 285 (5th Cir. 1982); *United States v. Escamilla*, 666 F.2d 126 (5th Cir. 1982); *United States v. Ochoa*, 609 F.2d 198 (5th Cir. 1980); *United States v. Labarbera*, 581 F.2d 107 (5th Cir. 1978).

Although the "guilt by association" problem presented by this evidence causes us some concern, we cannot accept Westmoreland's contention that admission of the evidence, even if erroneous, constituted reversible error. First, we cannot

say that the evidence concerning Junie Mixon "was irrelevant to any issue in the case." *Labarbera*, 581 F.2d at 109. The government offered the evidence to establish that Mixon and Westmoreland had talked about taking kickbacks, evidence that was clearly relevant to whether she was predisposed to commit the crimes or had been entrapped by the government as she claimed, and to counter her position that, as a new supervisor, she innocently dealt with corrupt vendors without realizing that they were offering her illegal payments. Second, "[t]he determination of the impact which a prejudicial statement has upon a jury must be made on a case by case basis." *Escamilla*, 666 F.2d at 128. After carefully reviewing the record in this case, we are unconvinced that the evidence objected to here had a prejudicial impact. References to Junie Mixon do not permeate the record; rather, the government questioned witnesses concerning him on only three occasions during five days of trial. Moreover, the trial judge instructed the jury to return a verdict on the offenses alleged in the indictment and to not consider the quilt or innocence of any person other than Westmoreland.

Most importantly, "[a] court's assessment of the impact of a prejudcial statement is tempered by the substantiality of evidence of the defendant's guilt." *Id.* at 129. Westmoreland admitted receiving payments for county purchases from Agent King and, on occasion, an unexplained envelope of cash from Ray Davis. Thus the issues at trial concerned her intent and lack of predisposition, and on these issues, the evidence was overwhelming. The tape recordings of Westmoreland accepting bribes show her discussing the kickback scheme with Agent King at length, including "busting" invoices or billing the county for undelivered goods and "splitting" invoices to avoid the state's bid advertising laws, and laughingly accepting Agent King's money during their first meeting. Westmoreland explained that she unwittlingly acquiesced in a plan orchestrated by Agent King because, as a new supervisor, she did not want to reveal her ignorance; however, at later meetings where she also

accepted money, she told Agent King how her recordkeeping system would prevent the state auditor from detecting their dealings-a statement that clearly belies her professed innocence. In addition to Westmoreland's willingness to accept illegal payments from Agent King, the evidence of her predisposition, as discussed below, was substantial. Even without considering evidence that she discussed taking kickbacks before the government became involved, surely the properly admitted evidence that she had previously used her public office for personal gain and that she dealt illegally with a vendor who was not a government agent shows that the government detected, rather than caused, her corruption. In short, we conclude that the jury convicted Westmoreland based on the overwhelming evidence of her guilt, not on any evidence of her friend's misconduct.

C. The Sufficiency of the Evidence

Westmoreland contends that the government failed to sufficiently prove three things: (1) predisposition, (2) extortion, and (3) mail fraud. The first arises from Westmoreland's defense of entrapment; the second and third are the substantive offenses charged in counts two through six of the indictment.[3] The government's burden of proof on each is the same, and the standard for reviewing a jury's verdict concerning them is similar. Concerning entrapment, we recently stated: "The Government bears the burden of proving beyond a reasonable doubt that defendant was predisposed to commit the offense, but entrapment is established as a matter of law only when no reasonable

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[3] Westmoreland also suggests that the government's conduct during the undercover operation was so outrageous that it required dismissal of the indictment. However, she did not show government overinvolvement in the charged crimes or any conduct by Agent King constituting one of the "rarest and most outrageous circumstances" that might warrant that result. *See United States v. Nations*, 764 F.2d 1073, 1076-77 (5th Cir. 1985). Thus we view this argument as meritless and focus on her claim that the government insufficiently proved her predisposition.

jury could have believed that defendant was predisposed to commit the offense." *United States v. Rubio*, 834 F.2d 442, 450 (5th Cir. 1987)(citations omitted). In reviewing the sufficiency of the evidence to support a conviction, "[t]he standard is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348, (5th Cir. 1988)(citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) and *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982)(en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983)). In performing each inquiry, we must view the evidence in the light most favorable to the government. *Hernandez-Palacios*, 838 F.2d at 1348; *Rubio*, 834 F.2d at 451.

1. Predisposition

[4] Predisposition may be shown by the defendant's conduct-by eager, active participance, *United States v. Nations*, 764 F.2d 1073, 1077 (5th Cir. 1985), or by similar conduct at other times, *United States v. Rodriguez*, 474 F.2d 587, 590 (5th Cir. 1973)-and by other evidence of the defendant's subjective mental state, *Rubio*, 834 F.2d at 450. "In essence, the jury must find that the defendant's culpable intent originated with the defendant and was not the result of acts of government agents." *Nations*, 764 F.2d at 1077. In this case, we conclude that the evidence was sufficient for a reasonable jury to find that Westmoreland was predisposed to commit the alleged crimes. There was no evidence of serious resistance by Westmoreland to Agent King's invitation to participate in the kickback scheme, and the jury could have viewed the tape-recorded conversations as evidence of Westmoreland's eager and active participance. Moreover, the evidence that Westmoreland engaged in similar conduct in her dealings with Ray Davis and that she had previously used her position as a public officer to misappropriate funds showed that she independently possessed an intent to commit the crimes.

2. Extortion

[5] Westmoreland was charged with extortion "under color of official right" in violation of 18 U.S.C. § 1951, commonly known as the Hobbs Act. "A conviction under the Hobbs Act may be sustained by a finding that a public official has taken a fee, unlawfully, under color of his public office, in return for performance or nonperformance of an official act." *United States v. Wright*, 797 F.2d 245, 250 (5th Cir. 1986). Westmoreland contends that her conduct, mere passive acceptance of a gratuity, did not constitute evidence that she conditioned the performance of an official duty on the payment of a fee and that there was no other evidence to support that conclusion. However, we have stated that "[t]here is no requirement that threat, force, or duress be proved when the defendant is a public officer," *id.*, and under the Hobbs Act, an official may not "accept money in return for requested exercises of his official power," *United States v. Dozier*, 672 F.2d 531, 539 (5th Cir. 1982). Thus while it is true that no witness testified that Westmoreland demanded kickbacks, the evidence that she accepted illegal payments in exchange for authorizing purchases of materials for the county was sufficient for a rational trier of fact to find that she committed extortion.

3. Mail Fraud

[6] Mail fraud requires proof of three elements: "(1) the defendant's participation in some scheme or artifice to defraud; (2) the use of the mails 'caused by' defendant or someone associated with the scheme; and (3) the use of the mails for the purpose of executing the scheme." *United States v. Davis*, 752 F.2d 963, 970 (5th Cir. 1985)(citations omitted). Westmoreland contends that she participated in a scheme to defraud using the mails that was devised by Agent King and that she neither knew of the scheme nor intended to participate in it. "Of course, the government must prove specific intent to defraud to establish the crime of mail fraud; however, this intent can be proven by

the scheme to defraud and may be inferred from other facts." *United States v. McDonald*, 837 F.2d 1287, 1293 (5th Cir. 1988)(citations omitted). In this case, the tape recordings of Westmoreland's conversations with Agent King indicate that they discussed the details of the scheme on several occasions, and we conclude that a rational trier of fact could have found that she both knew of the scheme to defraud and that she intentionally participated in it.

III.

For the above reasons, Westmoreland's convictions are AFFIRMED.

EXHIBIT "B"

AMENDED MOTION TO DISMISS INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Criminal No. H87-00009(L)

United States of America,

vs.

Trudie P. Westmoreland.

AMENDED MOTION TO DISMISS INDICTMENT

COMES NOW Trudie P. Westmoreland, Defendant in the above styled and numbered cause, by and through her attorney of record, and files this Motion to Dismiss Indictment exhibited against her and in support thereof would show unto the Court the following, to wit:

I.

Pursuant to Federal Rule of Criminal Procedure 12(b), Defendant believes that this Honorable Court should dismiss the instant indictment in that it was the result of extreme and outrageous Government misconduct. The conduct engaged in by the Government which Defendant believes will be made more clear upon the production of discovery requested by Defendant and briefly outlined in the Memorandum of Law in support of this Motion, violates Defendant's right to due process of law guaranteed by the Fifth Amendment to the United States Constitution.

II.

Count 1 and Count 5 and Count 6 of the indictment exhibited against Defendant charge Defendant with bribery and extortion

of the same funds and Counts 2-4 again charge Defendant with mail fraud concerning the same funds, in such a manner that the Defendant could be convicted more than once for the same offense in violation of the double jeopardy provision of the Fifth Amendment of the United States Constitution.

III.

Count 1 of the indictment charges the Defendant with the violation of Section 666(b) of Title 18 of the United States Code. Said section requires involvement of the jurisdictional amount of $5,000.00. The indictment on its face alleges that the Defendant received only the sum of $2,202.00 and, therefore, Count 1 of the indictment is fatally defective and this Court has no jurisdiction to hear the same. Furthermore, all counts of the indictment refer to the same series of transactions which do not involve property in excess of $5,000.00 and, therefore, this Court has no jurisdiction over the same.

IV.

Counts 2-4 of the indictment exhibited against Defendant fail to identify with sufficient particularity the third person supposedly defrauded by the alleged mail fraud scheme. Nowhere is it alleged in the indictment that the persons intended to be defrauded believed any false pretense which induced them to part with their money or other valuable thing. No false or unlawful pretense, fraud, device or scheme is sufficiently and accurately set forth and until it is so pleaded, an allegation that the United States mails were used in furtherance of it alleges no offense known to the law.

V.

Counts 2-4 of the indictment alleges use of the United States mail for the purpose of executing a fraudulent scheme. However, said counts are fatally defective because the alleged scheme contained in the indictment reached fruition prior to the mailing referred to in said indictment and the mailings referred

to in said indictment in no way were part of the alleged scheme. Therefore, the allegations contained in Counts 2-4 allege no offense known to the law.

VI.

Count 1, Count 5 and Count 6 of the indictment exhibited against the Defendant are so vague and ambiguous that they do not apprise the Defendant of the charges against her with sufficient specificity to permit her to adequately prepare her defense and plead the judgment in the instant case in bar to any later proceedings against her based upon the same alleged offense.

VII.

The evidence obtained by the Government from the Defendant was obtained by fraud and entrapment on the part of the Government, and therefore, was illegally seized. This evidence, being the fruit of entrapment and illegal seizure was presented to the Grand Jury and was the only basis for the indictment exhibited against the Defendant which should therefore be dismissed in its entirety.

WHEREFORE, PREMISES CONSIDERED, Defendant asks this Court to grant a hearing on the instant motion and prays upon such hearing this Honorable Court will dismiss all counts contained in the indictment exhibited against her.

Respectfully submitted,

TRUDIE P. WESTMORELAND

/s/ Alvin M. Binder
Her Attorney

Alvin M. Binder
Binder, Milner & Milner
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
(601) 948-8800

CERTIFICATE OF SERVICE

I, Alvin M. Binder, attorney of record for the Defendant in the above styled and numbered cause, do hereby certify that I have this date forwarded by United States mail, postage prepaid, a true and correct copy of the foregoing Motion to Dismiss to Honorable Ruth Harris, Assistant United States Attorney, James O. Eastland Building, Jackson, Mississippi 39205.

This the 28 day of April, 1987.

/s/ Alvin M. Binder

EXHIBIT "C"

ORDER ON MOTIONS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civil Action No. H87-00009(L)

United States of America,
Plaintiff,

v.

Trudie P. Westmoreland,
Defendant.

ORDER

This cause is before the court on numerous motions filed by defendant Trudie P. Westmoreland. The court has now fully considered each of the various motions, together with attachments and briefs in support thereof.

Defendant Westmoreland is a supervisor of the Fourth District of Perry County, Mississippi. The indictment against her charges that she, in her official capacity as county supervisor, accepted the sum of $2202 from persons or organizations other than her employer as bribes or kickbacks in the purchase of grader blades, metal pipe and other items. She is charged with bribery in violation of 18 U.S.C. § 666 and mail fraud and extortion in violation of 18 U.S.C. § 1341 and § 1951, respectively.

AMENDED MOTION TO DISMISS INDICTMENT

Defendant first alleges that the indictment against her was the result of extreme and outrageous misconduct by the government which violates her right to due process. According to Westmoreland, the government knew she had a good reputation

and had never committed any illegal acts, yet federal agents implemented a plan to improperly induce and trick her into the commission of various offenses to which she was not predisposed. This argument was asserted by defendant Thomas M. Heard in the case of *United States v. Heard,* Criminal No. J87-00013(B) (May 6, 1987).[1] As the court noted in *Heard,* the defense of outrageous government conduct which, if proven, would bar prosecution and require a dismissal of an indictment, is only available where there is proof of government overinvolvement in the crime charged together with proof of the defendant's passive involvement in the government-implemented criminal activity. *Heard,* Slip op. at 3-4, *citing United States v. Nations,* 764 F.2d 1073, 1077 (5th Cir. 1985). In the present case, as in *Heard,* the "record does not indicate that the agents pressured [Westmoreland] to commit the various offenses for which [she] is charged or were overly involved." Thus, the motion to dismiss the indictment on this ground is denied.

Defendant next contends that defendant is subjected to the possibility of being convicted more than once for the same offense in violation of the double jeopardy provision of the fifth amendment to the United States Constitution since counts I, V and VI of the indictment charge defendant with bribery and extortion involving the same sum of money, $2202, which constitutes the basis of counts II and VI, the mail fraud counts. This contention is without merit, since the "[e]ssential elements for bribery, mail fraud and extortion differ and each offense requires proof of additional facts than the other offenses." *See Heard,* Slip op. at 4.

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[1] The defendant in *Heard,* like Westmoreland, is a county supervisor for the First District of Copiah County, Mississippi. The indictments against Heard and against Westmoreland resulted from an extensive undercover operation by the Federal Bureau of Investigation known as "Operation Pretense."

According to defendant Westmoreland, this court lacks jurisdiction to entertain Count I of the indictment since 18 U.S.C. § 666(b) requires a jurisdictional amount of $5000 and the indictment against Westmoreland alleges that the defendant received only the sum of $2202. However, the indictment clearly alleges that the defendant was involved in a series of transactions and matters involving $5000 or more concerning the affairs of Perry County. Consequently, the motion to dismiss on this ground is denied.

18 U.S.C. § 666 provides, in essence, that this section is violated where an official of a local government agency, which receives benefits in excess of $10,000 in a one year period pursuant to federal programs providing federal assistance, "accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the [official's] conduct in any transaction or... of transactions... or matters involving $5000 or more concerning the affairs of such... local government agency." This defendant asserts that section 666 was intended to protect the integrity of money distributed through federal programs, and that only schemes of bribery involving the use of *federal funds* come within the ambit of section 666. According to defendant, there is no proof that federal funds were used in the bribery scheme with which defendant is charged. However, this precise issue was addressed by the court in *United States v. Smith,* No. E87-0000(B)(May 6, 1987), wherein the court concluded that to prove a violation of section 666, it is not necessary that the government trace expenditures, to which the alleged bribes or kickbacks are connected, to federal funds, stating that

> [i]t is enough on the face of the statute that federal funds are provided to a county in the amount of $10,000.00 and there is a bribery of a supervisor or other local government agent involving a transaction or series of transactions of at least $5,000.00 concerning the affairs of the government or organization. The language in Section 666 is clear that it is

> not an essential element of this crime that the government trace the $5000 to specific federal funds.

Smith, Slip op. at 5. For the reasons set forth in *Smith,* the motion to dismiss on this basis is denied.

Defendant next seeks dismissal on the ground that counts II through IV charge the defendant with mail fraud violations but do not specify the third person supposedly defrauded. This court concurs with the conclusion in *Heard* that "those persons defrauded were citizens of [Perry] County as sufficiently alleged in the indictment."

The court concludes that the defendant's contention that there has been no violation of the mail fraud statutes since the alleged payments to Westmoreland were accomplished prior to any mailings is without merit. Under the facts alleged, the mailings were an integral part of this scheme, and were for the purpose of executing and furthering the fraudulent scheme. Hence, the motion to dismiss on this ground is not well taken.

Further, contrary to the assertions of defendant, counts I, V and VI of the indictment are not vague and ambiguous such as would prevent defendant from adequately preparing her defense. The court has reviewed each of these counts and finds that they are sufficient to inform Westmoreland of the elements of the offenses with which she is charged so as to enable her to prepare her defense. Thus, she is not entitled, on this basis, to have the indictment dismissed.

The final ground asserted by defendant for dismissal of the indictment concerns evidence relied on by the grand jury in the indictment proceedings. According to defendant, the grand jury relied on evidence obtained through illegal entrapment procedures in the decision to indict her, and the indictment should therefore be quashed. On this issue, defendant requests an evidentiary hearing. Again, this precise issue was before the court in *Heard,* and what was said in that case is equally ap-

plicable here. That is, "the defendant does not set forth the facts on which [she] bases this affirmative defense of entrapment, but asserts that it will be revealed through discovery." The *Heard* court concluded, as does this court, that

> [s]ince entrapment is ordinarilly a defense asserted at trial, since defendant has not asserted that [she] did the acts alleged in the indictment, and since the taking of evidence pre-trial would be duplicitous, the Court will defer determination of the Motion to Dismiss until the trial of the general issue under Rule 12(e) of the Federal Rules of Criminal Procedure.

Heard, at 8.

MOTION TO CONTROL PREJUDICIAL PUBLICITY AND FOR A GAG ORDER

According to this defendant, the publicity which has been created and contributed to by the government in this case is so extremely prejudicial to her that it will affect the court's ability to secure an impartial jury in this matter. In support of this motion, defendant Westmoreland has supplied the court with numerous newspaper articles which reflect the amount of publicity surrounding the indictment and arrest of numerous supervisors, including defendant, pursuant to the FBI undercover operation which resulted in these arrests. Defendant requests a gag order prohibiting all attorneys, parties, witnesses, law enforcement and court personnel from extrajudicially releasing information in any form to the news media concerning any aspect of this proceeding or other similar proceedings involving county supervisors. The burden on defendant of showing the inevitability of juror prejudice which could not be cured by voir dire procedures has not, in the court's opinion, been met. *See Heard,* at 12 (*citing Globe Newspaper Company v. Superior Court of Norfolk County,* 457 U.S. 596 (1982) and *Murphy v. Florida,* 421 U.S. 794 (1975)).

MOTION TO SUPPRESS, OR IN THE ALTERNATIVE, MOTION IN LIMINE

Defendant Westmoreland seeks to suppress all evidence, oral and tangible, including but not limited to tape recordings, on the ground that the same was obtained through outrageous government conduct based on illegal entrapment procedures on the part of the government. As previously stated, there has been no showing of outrageous government conduct, which requires police over-involvement and a mere passive connection by defendant with the government-initiated criminal activity. Thus, the motion to suppress or, in the alternative, motion in limine is denied.

MOTION FOR ADDITIONAL TIME TO FILE MOTIONS

Defendant has moved for additional time to file appropriate dispositive motions. At this time all non-dispositive motions have been ruled upon and defendant has had ample opportunity to review the rquested discovery materials. Additionally, defendant does not identify what dispositive motions she wishes to file and it appears that all dispositive motions have previously been filed. Therefore, this motion is denied.

MOTION FOR PRETRIAL DISCLOSURE OF JURY LIST

Defendant requests that the court disclose the names of the jury panel ten days before trial. Inasmuch as the trial of this cause is scheduled for May 27, 1987, less than ten days from this date, this issue is moot, and the motion is therefore denied.

Accordingly, it is so ordered with respect to each of defendant's motions as described herein.

ORDERED this 22nd day of May, 1987.

/s/ illegible
United States District Judge

EXHIBIT "D"

TESTIMONY OF SHEILA PATTERSON - REGARDING TESTIMONY OFFERED BY THE GOVERNMENT CONCERNING AN "ON-GOING INVESTIGATION"

[633] SHEILA PATTERSON

was therupon called as a witness for and on behalf of the Government and, having been duly sworn, testified as follows, out of the presense of the jury:

DIRECT EXAMINATION

BY MRS. HARRIS:

Q. You are Mrs. Sheila Patterson, are you not?

A. Yes.

Q. Where do you work, Mrs. Patterson?

A. State Department of Audit.

Q. Is that in Jackson?

A. yes.

Q. What is your position there?

A. I am an investigative auditor.

Q. Okay. And what do you do as an investigative auditor?

A. We review, if we have a complaint from a citizen or either an audit referral, we review the books and records of an agency or governmental entity to see that they complied with the law. If they did not comply with the law, then we do schedules to determine the amount of non-compliance.

Q. Did there come a time when your office received a [634] complaint concerning the Defendant Trudie Westmoreland?

A. Yes. We received an audit referral from the Auditor who was doing the financial audit. It was an in-house in-agency complaint.

Q. And what did you do as a result of that in-agency complaint?

A. Okay. This case was assigned to another investigator at the time. I was not on the investigator staff at that time, and he started comparing the highway patrol tickets to the settlement sheets which is the form that the Justice Court Judges use to submit the monies they have collected in to the county.

Q. And was Trudie Westmoreland a Justice Court Judge?

A. Yes.

Q. During what period of time was she a Justice Court Judge?

Q. I believe, I'm not sure exactly when she went into office, but I believe it was 78. I know she went out of office in 83, the end of 83.

Q. And what period of time did the investigative audit concern itself with?

A. My audit was from January 1, 1981, through December 31, 1983.

Q. And when did you start working on the case?

A. In December of 86.

[635] Q. But there was another auditor that had it before you?

A. Yes.

Q. And he started his investigation when?

A. In 1984.

Q. Were there different methods that you used in conducting your investigation?

A. Yes. I used four methods to find the funds that were missing. I examined, first, the bail bond fees that the sheriff's office had submitted to the judge on behalf of the defendants. I traced those down to see if they had been settled to the county or turned in to the county or if they had been returned to the defendant. And I found that $3,860.50 had not been settled of the bail bond fees.

My next step was to compare traffic tickets from the Mississippi Highway Patrol to the settlement sheets from the judge, and I found that 1,573.50 of those funds were not settled or turned in to the county.

My third step was to test receipts, and we only had three or four receipt books for the period of time we were looking at. There should have been dozens of receipt books. We asked for these —

Q. Who did you ask?

A. We asked Mrs. Westmoreland first, and she said she turned them in to the Chancery Clerk, Alfred Lott.

Q. Did you ask him for it?

[636] A. Yes. He said he never got them. We also subpoenaed the records from Alfred Lott, and he didn't produce any more receipt books.

Q. Okay.

A. We found that $2,098.85 was unsettled from the receipts.

Q. When you say "unsettled," what do you mean?

A. Not paid in to the county.

THE COURT: From those three or four receipt books?

THE WITNESS: From those three or four receipt books.

A. My fourth step was to check the deposits into her Justice Court Account. Normally a judge would list each check separately so that you could identify the funds that went into the accounts. Instead, she listed a total figure for receipts. So I went to the bank and had them copy — they keep a microfilm copy of all checks that have cleared the bank that day. They pulled all of these for me and copied the checks deposited into her account. And of those checks, 1,974.10 was not turned in to the county for 1983.

I have not completed that part of the work because the bank is still copying checks and I have not had a chance to complete that part.

Q. So the $1900.00 only covers the year 1983?

A. Right.

Q. Okay. And you reached that figure from actually [637] looking at the checks that the people would write to the Defendant Mrs. Westmoreland?

A. Checks and money orders, anything other than cash.

Q. The actual backup behind the deposit tickets?

A. Right.

Q. All right. You say anything other than case. How, if in any way, did cash enter into your determination of these missing amounts?

A. I completely excluded that as if she had turned that in to the county, because I could not identify the cash.

Q. So we are completely excluding that?

A. Uh-huh (yes).

Q. What was the grand total that your audit revealed that Mrs. Westmoreland had not paid over to the county as she was supposed to?

A. Okay. The investigation is not complete, but the total thus far is 9,506.95.

THE COURT: When you say it's not complete, not complete in what respect?

THE WITNESS: The calendar year 1982 is not complete. The first step I took in checking this was I took her settlement sheets, which is the form sheet, turns in the funds to the county on, and I entered those line item by line item on the computer spread sheet. Then I sorted those alphabetically to come up with a list of the settlement **[638]** sheets. It was necessary to do this for a couple of reasons: One, the normal procedure for a judge to follow would be to submit to the county by the 20th of the month the funds that they had collected prior to the 20th of the month before. She didn't necessarily submit it to the county in this order. There — which didn't leave a clear audit trail.

She also destroyed the audit trail, in my opinion, by the way she entered the docket number. There is — the docket book that they put the cases in has a docket number as well as a page number. Most judges will put docket number, page number, the defendant's name and the rest of the information. She put a number which may have been the docket number, may have been the page number; but without tremendous searching and time it would have been very difficult to follow the order. There was no order in which she was reporting these. So the only choice I had was to try to make an order out of it and that, to me, was easiest to do alphabetically.

I entered 1981 as the first year that I was investigating first. I had very few receipts — well, no receipts, I don't think, from 1982, so I skipped to 83 thinking that those receipt books might turn up. 82 has been entered almost completely in the computer but not all, so I have not sorted that alphabetically in order to compare **[639]** it back to the tickets, the receipt books, the checks and the bail — well, I did compare it to the bail bond receipts, just physically checking, and to the tickets just physically checking through the names.

But as far as checking it to the checks that were deposited into her account, I need that alphabetical listing to complete the investigation.

Q. Mrs. Patterson, would — your completion of the investigation as you just described it, by the completion or maintaining or getting together the rest of the records that you have just talked about?

A. Uh-huh (yes).

Q. Would that in any way affect the total amount that you have already determined that was not turned over to the county?

A. Yes, there is a strong possibility the money will go up.

Q. Is there any way that the amount missing could go down as a result of the completion?

A. No. No.

THE COURT: Why wouldn't it go down?

THE WITNESS: Because the checks that the audit procedures or investigative procedures that I have used have definitely tied source documents — checks from the sheriff's office, receipts that Mrs. Westmoreland signed, **[640]** tickets from the highway patrol that had her signature with the disposition written on them, and checks deposited into her account — they have already been traced through the system and found not to have been turned into the county. These are documented and the whole flow of the audit investigation has been completed in this figure.

Q. Mrs. Patterson, in your review of Mrs. Westmoreland's checking account, did you ever find a check written on the account to her personal auto parts store, P&W Auto Parts?

A. The last check written in that account, which was actually after she left office, was $4,000.00 to P&W Auto Parts.

Q. How was that account set up?

A. It was styled "Justice of the Court Judge, Perry County, Beat 4, Trudie Westmoreland."

Q. Did she deposit her personal salary into that account?

A. No.

Q. Was it used, as far as you could tell, strictly for the Justice Court fees?

A. All the checks that I saw in there were apparently for traffic citations. They had notations on there that would say "traffic citation," some of them had the ticket number. They were all for an amount that would have been equal to the fine plus court cost at that time for traffic tickets.

Q. Did you see any checks that would indicate there was **[641]** income from her auto parts store going into that account?

A. No.

MRS. HARRIS: Your Honor, that's our brief proffer. Of course, we would anticipate testimony before the jury being much more detailed. But that's basically an overview of what we expect this witness to testify to.

THE COURT: Does the defendant take any position about this proffer?

MR. BINDER: Yes. Do we get to examine her at all, or?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. BINDER:

Q. Madam, have you been down in Hattiesburg during this trial since we started last week?

A. Yes, sir.

Q. Tell this Court, have you ever written a letter to this lady telling her that she owes the State of Mississippi one dollar or that she's out of whack in her books or records?

A. Oh, she knows she's out of whack in her books and the records.

Q. Please answer the question. Have you ever written her one demand letter?

A. The investigation is not complete. No, sir. That's not procedure to do until we have completed —
[642] Q. Isn't the answer no?

A. No.

MRS. HARRIS: Your Honor, would you please ask Mr. Binder to allow the witness to explain her answer and not to interrupt her.

THE COURT: All right. She was giving her explanation, though, before she answered the question. Answer the question, then you can explain.

Q. You don't know of any letter that ever went out to Mrs. Westmoreland prior to the time you took over from your department, do you?

A. There was an audit demand issued against you when she was a Justice Court Judge in fiscal year 79, if I am not mistaken; she repaid those funds.

Q. Madam, you know what I am talking about; please answer the question. Don't look at them, look at me.

A. I am looking at you. You said ever —

Q. Please tell this Judge, did you ever see, after she went out of office, where you people ever told her that she was out of whack with her books or owed the State some money or anything? Now did you?

A. Are you asking if I saw a letter or was she told?

MRS. HARRIS: May I interpose an objection to this line of questioning. We submit it's irrelevant as far as the admissibility of this evidence is concerned whether or **[643]** not she knows they are even conducting an investigation.

THE COURT: It seems that this part of the inquiry would bear more on the weight of her testimony than on its admissiblity. But I am not going to sustain the objection, but I am telling you that; maybe you can move along with it.

Q. You mentioned to the Judge that you had, for example, $10,000 or a little more missing; right?

A. 9,506.95.

Q. Now, on the first day of this trial, Mr. Tucker and Mrs. Harris gave me this, and the total then was 7,563.40, wasn't it?

A. Yes, sir.

Q. How did it get to $9,000.00 in eight days?

A. Because on Wednesday or — no, on Thursday of last week I went to the Perry County Bank and picked up the checks that were deposited into her account. I had asked the bank to copy these checks prior to this, me even having knowledge of this court date being set.

Q. Oh, you had knowledge of it, madam, you sat during the jury selection, didn't you?

A. I had asked the bank to copy the checks prior to that knowledge of the Court date being set.

Q. Let me ask you this. You are — it's truthful, is it not — let me rephrase that. Isn't it a fact and doesn't your file reflect that when she left office, that they **[644]** okayed her accounts, your department told her that everything was all right.

A. There was an investigation pending in 1984 because of the audit referral.

Q. You wouldn't deny, though, that prior to you coming on board with Ray Mabus, that the audit department okayed her books and she transferred her funds?

A. I have no knowledge of that.

Q. You have no knowledge of it, do you?

A. (Shakes head.)

Q. And you don't have any knowledge of what books she turned in, do you? You are talking about hearsay; you weren't there, were you?

A. I have gotten the records from Alfred Lott, I have gotten the records from Mrs. Westmoreland, and they have told me that this is all the records that they have.

Q. But you are not telling this Judge under your oath you know what books she turned in, do you?

A. I know what settlement sheets she turned in, yes, sir. That comes straight out of the —

Q. I am talking about her books. I am not talking about settlement sheets. Please answer the question. Were you —

A. No, sir.

Q. You are telling this Judge that this audit is still **[645]** incomplete?

A. Yes, sir. Investigation.

Q. Investigation is ongoing?

A. Yes, sir.

Q. And you are telling this Judge this is the first notification, is it not, of any dollar amounts that you say is missing? She

hadn't had any chance to look at your paperwork or defend herself or reply to your allegations from this stand, has she?

A. No, sir.

Q. It's the first time she's ever heard this; right?

A. No, sir, it's not the first time she's heard of this. It's the first time she's heard a dollar figure.

Q. But she has not had time to see whether you are right or wrong, has she, madam?

A. No, sir.

Q. And you are not infallible; you are not telling this Court that everything you put down is correct, are you?

A. I'm not infallible. I have checked and double checked these figures.

MR. BINDER: Your Honor, we'd like to reply now legally to the proffer, if we may.

THE COURT: All right, sir. I'm going to let Mrs. Patterson be excused since here testimony for now is complete.

[646] (Witness excused.)

MR. BINDER: May it Please the Court. 404(b) says evidence of prior bad acts is not admissible to prove character. It may be admissible to prove motive, intent or plan, but not where the prejudice is great as it is in this case, and the probative value is slight. *U.S. vs. Fray* (spelled phonetically), it's a Fifth Circuit case in 78.

The Fifth Circuit takes the restrictive view as in *United States vs. Webster,* 649 F.2d 346, a 1981 case, where hearsay was not allowed to prove prior bad acts.

In addition to the extreme prejudice problem, the requisite similarity of crime and proximity of time test is not met here.

Prior misconduct must be virtually identical and acts close in time to crimes charged. We have a Ninth Circuit case on that, *U.S. vs. Buck,* 548 F.2d 871, in 77. *United States vs. Pisari,* 636 F.2d 855, in the First Circuit. We have a Fourth Circuit case, *United States vs. Davis,* 657 F.2d 637, in 81. And we have a Third Circuit case, *Commission of Pennsylvania vs. Porter,* 659 F.2d 306, in 81.

In this case the supposed embezzlement occurred years before the alleged crime charged. Further, she's now charged with bribery, extortion and mail fraud and not embezzlement. In addition, there is not sufficient evidence for the jury to find the defendant in fact committed **[647]** embezzlement. The little lady says that the audit is not complete, and she admits there are records that are missing, and this defendant hasn't had an opportunity to see what she's got.

A key case in the Fifth Circuit is *United States vs. Robinson,* 700 F.2d 205, in 1983. *Robinson* says that prior acts may be used to show intent only if they are relevant to the charged crime and not unfairly prejudicial, indicating that even if relevant, they may be excluded if there is a danger of unfair prejudice. And that's what we've got here. *Robinson* makes it clear that other wrongs must be relevant to an issue other than propensity, and the Government has not shown this. They are truly trying to use this witness to deal with that issue of propensity, and the Fifth Circuit says you can't use a 404(b) witness in that manner, and *Robinson* so states.

THE COURT: What is the cite on *Robinson?*

MR. BINDER: 700 F.2d 205 (1983). The defendant specifically requests an on-the-record articulation by the Court of the probative value, the prejudice evaluation, and the factors upon which the Court relies in accordance with *Robinson* when your Honor rules on this instant question.

We respectfully urge this Court and believe that this proposed 404(b) testimony should be excluded for the reasons argued

and, further, that it's just unbelievable that an **[648]** attempt would be made at the last moments of this trial to prejudice the jury in this manner where a defendant can't even defend itself against these so-called charges.

THE COURT: What does the Government say in response to the motion of the defendant to exclude evidence?

MRS. HARRIS: Your Honor, we submit, first of all, that the proffered evidence is admissible to rebut the defendant's claim of entrapment. I think the case law is clear that when the defense of entrapment is raised, the Government is allowed to put on evidence to show the defendant was in fact predisposed to commit the crime. We submit that the defendant herself has raised this issue by claiming she has never been in a position ever before, she testified to that, of being tempted with large sums of money.

We submit that this particular evidence will show that she has in fact had large sums of money at her disposal before, in fact more public official funds or official funds, and that she embezzled those funds and she kept them and converted them to her own use.

Mr. Binder misstates the Fifth Circuit standard for 404(b) admissibility. The standard in the Fifth Circuit is a liberal standard and in a lot of cases has been considered as rule of inclusion rather than exclusion, where the probative value of the evidence outweighs the prejudicial **[649]** effect, which was set forth, of course, in the en banc case of *United States vs. Beecham* which is the leading Fifth Circuit case on this particular issue.

We submit that in this case the probativeness of this evidence very, very valuable in this case because the defendant has claimed that she had no intent, no predisposition to commit the crimes charged in the Indictment. And that this particular evidence will go to her intent and will rebut the entrapment defense.

A couple of cases in support of that, Fifth Circuit case, *United States vs. Mack* 643 F.2d 1119, which is a 1981 Fifth Circuit. And then another one is *United States vs. Henciar,* 568 F.2d 489, a Sixth Circuit 1977 case, where the Court stated specifically that, "By raising the defense of entrapment, the defendant put her intent in issue. Accordingly, evidence of other wrongful acts was admissible in order to show intent and predisposition," citing Rule 404(b).

THE COURT: Mrs. Harris, Mr. Binder cited the *Robinson* case, and I understood him to say that it was not admissible to show propensity. What do you say about that?

MRS. HARRIS: Your Honor, I think what he is trying to say it's not admissible to show propensity to commit the crimes charged in the Indictment, that it only goes to intent. That's the proper standard. I submit that that **[650]** case, if it's the one I am familiar with, is the *Arlan Robinson* case, a case tried by James Tucker in this district, a case against a County Supervisor, where evidence of other similar acts some seven years before, I believe, were admitted, and James argued the case before the Fifth Circuit and they found that similar acts evidence was properly admissible in that case. It can't go to show the defendant's character, you know, to commit the crimes charged but intent.

THE COURT: All right. Discuss how the allegation by the witness this morning is similar to the charges in the Indictment.

MRS. HARRIS: We submit it's similar, your Honor, because it — we are talking about a public position, she was a public official in both cases, the money she was dealing with was funds out of the public coffer, public funds. She had control over the money in the first instance as being a Justice Court Judge, and as Supervisor she had authority to purchase the various supplies and equipment.

Also, I submit that similarities of offense is not that relevant when we are talking about intent, that a lot of times the similari-

ty requirement, when you are trying to prove identity or similar type plan or scheme, that's where really the similarity of the offense comes into play more than as this particular case where it's to rebut the **[651]** entrapment-predisposition type situation.

I would further state, your Honor, that five of the six counts in this particular case involve allegations concerning abuse of office by a public official. And we submit that in both instances, in the Justice Court Judge embezzlement situation and in this case, she has abused her position as a public official.

I want to state one more thing for the record, you Honor. Mr. Binder was put on notice about this evidence, even though we are under no requirement to tell him about any kind of rebuttal evidence, that James called him Thursday or Friday before trial, told him that we probably would present this kind of evidence if the circumstances arose. He said that he had checked with the District Attorney about the situation, indicating that he was familiar with it. And also on the first day of trial, we gave him copies of the auditor's, work sheets I guess you would call them, work papers, again which we are not required to do but did provide those with him. And I say that in response to his statements that they've had no time to review this stuff or prepare any kind of defense to it.

THE COURT: All right, Mr. Binder.

MR. BINDER: I'd like to first address myself to these personal comments. Number One, Mr. Tucker told me, as Mrs. Harris stated, probably on the day mentioned, that he, **[652]** quote: Might have some 404(b) matter like that. He didn't say 404(b) but I recognized it. I called the District Attorney of this county to see if such an allegation was true and was told that there were no documents in his possession about such an allegation. I further notified Mr. Tucker of that.

When I got to the courtroom, Mrs. Harris is correct, they gave me these documents at a different rate as I pointed out

than what she said this morning. But it is a matter that no defendant could ever defend himself on, when you are talking about extensive records that are incomplete, that are not finished in an audit, to have a defendant wheel around on the day that he's charged with mail fraud and all these other matters, and you hand them a document containing all of these figures, I put them where they rightfully should go, in my briefcase, because I didn't know what the charges were, what the allegations were, my client has never been notified by anybody that she owed one dollar.

Now what she's not saying to you, counsel opposite is, is that we have, I think, correctly cited the law to you. The case we cited said that 404(b) evidence should not be used to show propensity, and Mrs. Harris just said that's what they are trying to do. The prejudice of this type evidence at this stage of the trial is overwhelming.

What she has not discussed with you in her argument is **[653]** that those charges do not come about close in time to these matters we are charged with. If there was an embezzlement, which we sorely deny, that would have occurred four years ago, and they ignore that in their argument to you on purpose, because that's one of the key elements that they have got to show. And they have a time problem that's an insurmountable problem, and we have the problem that no lawyer or client could defend themselves against a bookkeeping charge unless you have the allegations and you can get the books and you have the time to respond to it, your Honor.

We were in trial, there is no way we can respond to these charges. And we do have, my client tells me, every right to show that this is just incorrect, these charges. Half of these people, the little I know about it is that many people that were fined never paid their fines. Many bonds were made are authorized by highway patrolmen and other people in legal power that were personal recongizance bonds. We hadn't had a chance to look

over what they are talking from. And they've got — we don't even have the books and records here where we could cross-examine this person, if you allow the evidence, where I could make any sense or to bring forth anything favorable for my client. It's just improper. Thank you.

THE COURT: Mr. Binder, when was it that your client **[654]** completed her service as a Justice Court Judge? Was it at the end of 1983 or just prior to her becoming Supervisor?

MR. BINDER: Yes, sir, 1983.

THE COURT: The Government has cited two cases and the defendant cited several including the *Robinson* case. I want to spend a few minutes reviewing those cases, so we'll take a recess for approximately 15 minutes.

(A recess was taken from 10:10 a.m. to 10:25 a.m.)

(Out of jury's presence.)

THE COURT: Under Rule 404(b), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show the act in conformity therewith, but it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Before the Court admits evidence of others crimes, the Court must first satisfy itself that the proof of the prior similar offense is plain and convincing, that the offense is not too remote, that the element of prior crimes such as intent is a material issue in the prosecution, and that there is a substantial need for the probative value of the evidence provided by the prior crime. If these elements are present, and if it appears that the need for such evidence outweighs the potential prejudicial effect it is likely to have, then the evidence is admissible.

[655] In this case the defendant has interposed the defense of entrapment with reference to some of the counts in the Indict-

ment. The position is taken that there was no predisposition on the part of the defendant, and that her will was overborne by the FBI agent who was posing as an equipment salesman.

It's apparent that intent in this case is a very important and material issue in the prosecution of the case. The Government is placed in the position of undertaking to rebut the entrapment defense. The Court concludes that there is a substantial need for the probative value of the evidence, that is, as I said, for the Government to rebut the entrapment defense.

With reference to proximity in time, I read the *Robinson* case and in that case the other acts or the 404(b) acts were alleged to have occurred some three years before the occurrence of the matters charged in the Indictment. Here, the 404(b) alleged acts occurred two-plus years, let's assume from December 1983 until February — no, from December 1983 until February 1986, two years and two months, and then you can go back from that period on back to about four years. I don't make that comparison just to conclude that the *Robinson* case is dispositive with reference to remoteness, but that was a case where the alleged acts were committed some three years prior to the charges laid in the **[656]** Indictment.

Considering that the defendant served as a Justice Court Judge and her next public service occurred some, or began some two years thereafter, and the acts charged in the Indictment are alleged to have occurred some two or three months following her commencement of service as a Supervisor, the Court concludes that the acts were sufficiently close in time — and I say the acts, I mean alleged acts; it's a matter of proof.

So far as similarity of acts is concerned, the charges here are charges basically of bribery. The allegation with reference to other acts is one of embezzlement. Both situations involve charges of abuse of office by a public official and involving public funds. The Court concludes that the acts alleged by the Government in rebuttal are relevant to the charged crimes.

The Court has heard the proffer and, of course, has not heard the details of the evidence proposed to be adduced, but is of the opinion that there is a sufficient showing to meet the test of being sufficiently plain and convincing.

The proposed rebuttal is obviously prejudicial, but in weighing and balancing as the Court must do under Rule 403, the Court concludes that the probative value is not substantially outweighed by the danger of unfair prejudice and accordingly will overrule the motion to exclude the **[657]** evidence and allow the Government to present the proof in rebuttal. Are you ready to proceed?

MR. TUCKER: Yes, we need to get the witness, your Honor.

MR. BINDER: May we approach the bench?

(At the bench, as follows, with all counsel and the Court:)

MR. BINDER: Judge, I understand the ruling. The only query that I have is I don't have any records to cross-examine her on. Whatever she says in light of the proffer is much damage to me. How are you going to limit them to letting her tell the allegations, if they go into details; I am helpless?

THE COURT: What do you propose to do?

MRS. HARRIS: Your Honor, I propose to allow her to go into detail concerning her investigation.

MR. TUCKER: The documents that — by way of explanation, your Honor, the documents that she has which she would have on the witness stand, which are her summary sheets, after reviewing the records are the same document. Her direct examination will be based on the documents that we provided Mr. Binder Wednesday a week ago.

THE COURT: The same documents?

MR. TUCKER: Yes, sir, that's what she has in that file folder is what we gave Al a week ago.

[658] MR. BINDER: Those are summaries, they are not — they changed, the totals had even changed. They are summaries of accounting sheets, handwritten of what this witness has taken from some other documents. I don't have the resource documents to question her on as they know.

THE COURT: Is all that she has here, summary sheets?

MR. TUCKER: You mean available?

THE COURT: Yes.

MR. TUCKER: No, sir. She has the bank records that she testified about, she has all of the, what she calls settlement sheets, your Honor, which are the monthly reports, she has all of those with her.

THE COURT: What are you asking me, Mr. Binder, what I am going to — what are you asking me to do or not do?

MR. BINDER: I've got two problems. You ruled that the alleged wrong is due before the jury. I am asking you to contain that into broad general statements about, that audit is not even finished, that they found, allegedly, some funds that they say are not accounted for, and give the totals. If they go into the records and she recites all these statements that she's obviously been prepared for, like negotiation, your Honor, she said awhile ago this is going to go up and not down, those things are not proof. I don't have any way to reply to anything like that and they know that. This is an unfinished audit.

[659] MRS. HARRIS: He can bring all of that out on cross-examination, your Honor. I don't think he has any right to try and limit our witness' testimony in that manner.

THE COURT: I don't plan to limit, because the strength of the testimony would — for example, the Court in weighing the strength of the testimony would consider how strong it was, and that might be based in part on details to be given. But my ques-

tion of you is: If they go into more detail than you are asking for, are you going to need some time?

MR. BINDER: I need to look at what they — I don't —

THE COURT: I wouldn't grant you time to do that.

MR. BINDER: I need a few minutes to look at the source documents.

THE COURT: I will allow you to do that.

MR. BINDER: Would you provide them to me in your room back there; I'd just like to look at them?

THE COURT: The next thing is — of course, the order of proof is for the Government to have rebuttal. If you wanted to put your client on and explain, that's up to you.

MR. BINDER: Thank you, your Honor. How much time would you give me?

THE COURT: How much time do you want?

[660] MR. BINDER: It's quarter to 11. How many books are there, James?

MR. TUCKER: How many what?

MR. BINDER: How many books are there that she's got with her, how many source materials?

MRS. HARRIS: It's a bunch of stuff. I mean, it's a lot of checks and receipt books and settlement sheets.

THE COURT: Would you like to just go ahead and have the testimony and might get a better idea of what you needed to do?

MR. BINDER: Okay.

MRS. HARRIS: Your Honor, does the Court intend to give a cautionary trial instruction?

THE COURT: Yes, I've got it right here.

(End bench discussion on the record.)

THE COURT: Mr. Binder, it is not necessary that you make any further objection on the record to this testimony; the Court considers that you have objected to all of it.

MR. BINDER: Thank you, Judge.

(Jury present.)

THE COURT: Does the Government have rebuttal testimony?

MRS. HARRIS: Yes, your Honor, we would call Sheila Patterson.

THE COURT: Members of the Jury: You are now about **[661]** to hear some testimony concerning which I want to give you a special instruction to follow, and listen to this instruction and apply it. Evidence or testimony that an accused committed an act at one time or on one occasion is not evidence or proof whatever that such person did a similar act at another time or on another occasion.

In other words, testimony that a defendant may have committed at some other time an act similar to the act or acts alleged in the Indictment in this case may not be considered by you in determining whether the accused in fact committed any act alleged in the Indictment.

Indeed, evidence or testimony concerning an act of a similar nature allegedly committed at sometime or place not charged in the Indictment may not be considered for any purpose whatsoever unless you first find that the other evidence in the case standing alone establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the Indictment under deliberation.

On the other hand, if you, the jury, should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the Indictment, then you may consider evidence as to some other act of a similar or like nature on the part of the accused in determining the state of mind or intent with which the accused did the act charged in the Indictment. And where proof of an alleged similar act done at some other time or place is clear and conclusive, you, the jury, may, but are not obliged to, draw the inference and find that, in doing the act charged in the Indictment, the accused acted willfully and not because of mistake or accident or other innocent reason.

I will give you a similar instruction relating to the testimony you are about to hear again when I instruct you at the conclusion of the case. Proceed.

SHEILA PATTERSON

was thereupon called as a witness for and on behalf of the Government in rebuttal and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MRS. HARRIS:

Q. Please state your name for the record.

A. Sheila Patterson.

Q. Are you employed, Mrs. Patterson?

A. Yes.

Q. How are you employed?

A. With the State Department of Audit.

Q. What is your position there with the State Department of Audit?

A. I am an investigative auditor.

Q. What's your educational background?

[663] A. I have a B.S. degree from Mississippi College with a major in accounting and mathematics.

Q. What are your duties with the State Department of Sudit as an investigative auditor?

A. If the Audit Department receives a complaint either from a citizen or from an audit referral, some of our people that are doing a financial audit on the records of a governmental entity at the time, we go in and do an investigation of the records to see if there was non-compliance with the law. If they did not comply with the law, we prepare schedules and work sheets that would come up with a monetary figure, a dollar figure, of how much was in non-compliance with the law.

Q. And how long have you held that position?

A. Since November of 86.

Q. And what did you do before that?

A. I worked with a private CPA firm right out of college, then I worked with the State Department of Audit for five years after that. I left there and went with Pat Harrison Waterway as their physical officer for two and a half years, and I've been back with the Audit Department for a year and a half.

Q. The whole time that you've been with the Audit Department, have you been an investigative auditor or did you do other things?

[664] A. No, I worked as a County Auditor.

Q. And what does a County Auditor do?

A. They do the financial audit of the county books.

Q. Are you familiar with public officials known as Justice Court Judges?

A. Yes.

Q. What is a Justice Court Judge?

A. They hear cases on violations such as traffic citations, game and fish violations, things of that nature.

Q. Do you know if they used to be called Justice of the Peace?

A. Yes.

Q. J.P.'s?

A. Yes.

Q. Do you know if the defendant in this case, Trudie Westmoreland, was ever a Justice Court Judge?

A. Yes.

Q. For what period of time was she?

A. I think from 1978, I'm not sure of the beginning date, but she went out of office in 1983, December of 83.

Q. Okay. And what county was she so employed?

A. Perry County.

Q. Perry County?

A. (Nods head.)

Q. Is that an elected position?

[665] A. Yes.

Q. As part of your official duties there with the State Auditor's Office, did you have an occasion to conduct an investigation of Trudie Westmoreland's books and records as a Justice Court Judge?

A. Yes, I did.

Q. What began that particular investigation? How was it started?

A. The financial auditor that was doing the audit at the time gave us a referral of some problems they saw in the records in January of 1984, and we began an investigation in 84.

Q. Were they conducting an audit of the county, or?

A. Yes.

Q. And they referred the case to you?

A. Yes.

Q. To the investigations division?

A. (Nods head.)

Q. When did you — all right. When did the investigative audit of Mrs. Westmoreland's books begin in your office?

A. 1984.

Q. And when did you become involved in the investigation?

A. December of 86.

Q. December?

A. Uh-huh (yes).

[666] Q. What period of time did the audit cover or the investigation cover?

A. January of 81 through December of 83.

Q. Okay. During the period of time that you just set forth, January 81 to December of 83, did Justice Court Judges in Mississippi, including Mrs. Westmoreland, have control or did they handle their own money in that office?

A. Yes.

Q. Did they have control and handle all of the fees that were paid to them as part of their jobs as Justice Court Judges?

A. All of the fines and court cost, yes.

Q. Do you know how that situation is handled now? Is it still the same?

A. No. There is a Justice Court Clerk now who handles the money. The judge decides on the case and the money is paid to the clerk or one of their deputies, and they handle it from there into paying the funds back in to the county general fund.

Q. And so during the time period that your investigation covered, was Mrs. Westmoreland responsible for all of the funds that she collected?

A. Yes.

Q. Did your investigation reveal that Mrs. Westmoreland properly and correctly turned over all of the funds that she **[667]** collected to the county?

A. No, she did not.

Q. What amounts did she not properly turn over to the county?

A. Our investigation is still incomplete. So far we have $9,506.95 of funds that were not turned in to the county that were supposed to be turned in.

Q. Now let me back up a little bit and just ask you. What type of funds do Justice Court Judges collect from the public?

A. Okay. They collect traffic tickets, the payment of traffic tickets, bail bond monies; in other words, if a person were arrested and they paid a bond to get out of jail, that would be paid at the sheriff's office at this time, and the sheriff would then turn over that money to the judge by means of a check; she col-

lected these. She also collected monies for hunting and fishing violations.

Q. Okay. And what is she supposed to do with this money she collects?

A. She is to accumulate it for a month's time and settle it or pay it into the county by the 20th of each month.

Q. And again did your investigation reveal that she did not turn over all of that money that she collected?

A. Yes.

Q. And I believe you said it was $9,506.95 that was not **[668]** paid over?

A. Correct.

Q. All right. What type of books should a Justice Court Judge maintain, books and records, to keep up with the funds that they collect?

A. They should have a receipt book that has prenumbered, consecutive numbers in it. When a person goes in and pays their traffic fine or hunting and fishing fine, whatever the fine may be, they should issue them a receipt out of that book, it's got a carbon in it, the defendant, the person paying the fine, gets the original, and the judge should keep the copy.

She should also maintain an account to put these funds in once she's collected them from the defendant. And like I said, these funds are accumulated for a month's time. When she turns the funds over to the county or writes them a check, there is a schedule that we refer to as a settlement sheet that has lines on it, and you can, you write the docket number, page number, the defendant's name, the date of the offense, the charge, the amount paid in and the disposition of the fine, or whether they were guilty or the charge was dismissed, or if there was a warrant issued for their arrest for failing to appear.

On or before the 20th, she should fill out this sheet on each defendant that she has collected money from. Then **[669]** she comes to a total amount and she cuts the county one check for that amount, gives it to the Chancery Clerk who deposits it into the county general fund.

Q. All right. That's the way that records should be maintained by Justice Court Judges?

A. Right. In addition, there is a docket book where the offense is recoreded initially. When she rules on the case, she should write the disposition of the case in there and the amount of the fine and the court cost. For a proper audit trail, she should put the number, the receipt number, so that the receipt can be traced back to the docket number.

Q. Did Mrs. Trudie Westmoreland maintain records like that in the manner that they should have been maintained?

A. No.

Q. How did she maintain them?

A. She did issue prenumbered receipts, but when we asked for those receipt books we were only given three or four receipt books for the whole, from 1978 through 83.

Q. Who did you ask to get those receipt books?

A. We asked Mrs. Westmoreland first, she said that she turned them into the Chancery Clerk when she left office. The Chancery Clerk said that he never got them.

Q. Okay. How many receipt books did you get from her?

A. I believe it was four, three or four.

Q. And how many should you have received?

[670] A. Dozens.

Q. Okay. Anything else that was different in the way that she maintained records then from the normal course of procedure?

A. Yes. The settlement sheet that I referred to where she writes out the defendant's name once a month on the sheet and writes a check to the county. Like I said, it's normal procedure for the judge to put the docket number and the page number, and a docket is just a big book and it has prenumbered pages in it. The book has a number also, so in order to go straight to a receipt or a case, you would have to know, first, which book you were looking in and then which page. She did not put the book number and the page number on her receipts. She put a number which could have been the page number, could have been the docket number, but they were in no order whatsoever. So this made it very difficult to audit and to trace through the records.

Q. Did it appear that the way she maintained the records, maintaining them in that way, did that appear to you to be an intentional —

MR. BINDER: We object to that, your Honor. That's looking into a person's mind.

THE COURT: The objection is sustained.

Q. Anything else different about the records?

A. In addition, when she deposited the money in the bank, **[671]** normally the deposit slip gives you a place to list all of your checks, and normally a judge would list the person's name and the amount of their check, and each one would be listed on the deposit slip. Instead, she simply put a total of the checks. So when we reviewed her bank records and looked at the deposit slips, all we had was a total; that made it impossible from that audit trail to trace it back into who paid the fine.

We had to go then to the bank and have them pull their microfilm copies of the checks that were deposited into her bank. They keep a copy of all deposits that are deposited, and they copied those for us, and that was the only way we could trace them into the settlement sheets.

Q. Are those copies of checks from the people that actually wrote her checks?

A. Right.

Q. All right. Let me ask you this. In conducting your investigation, did you use more than one method to check her records?

A. Yes.

Q. Just tell us what those methods were. Just list them, if you would, please.

A. Okay. The first thing I did was list each one of her settlements from her settlement sheets, enter them on a computer work sheet. I had to do this in order to get some **[672]** order to the settlements because, like I said, she didn't do it by docket number, she didn't do it by receipt number, and she didn't do it by date number. So I entered those and sorted them alphabetically by the name of the defendant.

Then I used four methods to determine where the sources of her money came from. One method was I got the canceled checks from the sheriff's office, where he had written her checks for the bail bond money where people had paid for their bail. I traced these into the settlement sheets and made a list of the ones that were not refunded to the county. There was one other way that she could refund that money and that was to the defendant if he was found not guilty, then the money would be returned to him or her.

I got her bank records and the checks from her account and determined what monies were returned to the defendants. The balance that was not turned in to the county or the defendant came up to 3,860.50.

The second method I used was I obtained the copies of the highway patrol tickets from the Mississippi Highway Patrol —

Q. Let me stop you a second before you get into the highway patrol situation. First of all, do you know how bail bonds work?

A. At that time the defendant paid the bond to the sheriff, and then the sheriff submitted the money to the **[673]** judge.

Q. All right. When you say a defendant, are you talking about somebody that's been arrested on some type of —

A. The person that's been arrested. In order to get out of jail, they had to post a cash bond, and that money was given to the sheriff, he wrote them a receipt for it and documented who paid the money, then he wrote a check for the amount to the judge.

Q. And what was the amount that you found that the Defendant Mrs. Westmoreland did not pay over to the county in relation to bail bonds?

A. 3,860.50.

Q. All right. And now you've testified that you used more than one method. What was your purpose in using more than one method to review her records?

A. We had incomplete records. Without the receipt books, which is the normal method that you would follow in an audit or an investigation in determining who paid the money and then what happened to the money after that. You would normally start with the receipts but, like I said, we only had three or four receipt books, and at least one of those was for a period of time before our investigation.

Q. And one more time what did you say a settlement sheet was?

A. Okay. The settlement sheet is just a report that she **[674]** fills out, and it's got several lines to a page, it shows the docket number, page number, the defendant's name, the person who paid the money, what they were charged with, the date of the offense occurred, the amount they paid, and the disposition by

the judge, whether or not they were guilty or the charge was dismissed or there was a warrant issued for their arrest.

Q. But does all of that that's reflected on the settlement sheet, does that reflect or is that a report to the county of the money that she's supposed to be turning over each month?

A. Yes, it goes with the check from her to the Chancery Clerk.

Q. Being the money that's supposed to be paid to the county?

A. Right.

Q. All right. I think you had mentioned something about Mississippi Highway Patrol tickets?

A. Yes.

Q. First of all, just give us a little background on how a Justice Court Judge would work with the highway patrol in tickets.

A. Okay. At that time when a person received a ticket, they went to the judge, the judge ruled on the case and also set the — well, there were guidelines in the law as to how **[675]** much the fine could be, and then the court costs were spelled out in the law.

Q. Could these be people that were caught speeding through Perry County?

A. Yes. She then — they then would pay her the amount of money that she charged them with, according to the fine that could be charged, and the court costs, if they were charged as being guilty.

Q. If they were speeding a certain speed, would they be charged more, perhaps, than another speed; is that what you are talking about?

A. Right.

Q. Okay.

A. And she would issue them a receipt out of this prenumbered receipt book. That money would be deposited into her account. And then once a month, she would enter these on the settlement sheets by line item, and then the total check would be for all, for multiple charges or multiple defendants.

Q. And did you review her records in reference to highway patrol tickets?

A. Yes, I did.

Q. What did your review find or show?

A. Okay. On the highway patrol ticket, at the bottom when they went to the judge, appeared before the judge, she wrote **[676]** the disposition of the case; in other words, whether they were guilty or it was dismissed. She also wrote the amount of the fine on there, and she signed it. And this was an indication that the person was charged as being guilty, that they did pay a fine; there would be no reason to write that on there because it goes to the highway patrol and it's entered on that person's records. Of these tickets, I found that $1,573.50 were not turned in to the county.

Q. And how did you find that they were not turned in? What investigation did did you conduct?

A. There are multiple parts to the highway, to the highway patrol's ticket. The person who is driving, who is caught speeding or whatever, gets the offender's copy. There is another copy that's called the auditor's copy; we get that. There is a commissioner's copy, and there is a — which goes to the highway patrol. And then there is the officer's copy. Now, the disposition of the case is written on the officer's and commissioner's copy; it is not written on the auditor's copy.

When we started the investigation, we went to the highway patrol and asked them for the other copies of the ticket which would allow us to determine what the disposition was, what the

person actually paid to the judge on that traffic citation. I put all of these in numerical order and then traced them by the defendant's name into this **[677]** alphabetical listing of her settlements that I had prepared.

Q. And what did that comparison show?

A. It showed some fines to have been settled, but it showed 1,573.50 not to have been paid in to the county.

Q. Okay. When you say "settled," what do you mean?

A. Paid in to the county.

Q. The total amount that was not paid in to the county was $1,573.00?

A. And 50 cents.

Q. And 50 cents. Did you perform another test or method of review on Mrs. Westmoreland's Justice Court Judge records?

A. Yes.

Q. What was that?

A. I took the receipts, the receipt books that we did have, listed those. I listed each person's name and how much they paid her based on that receipt signed by her. Beside that, I listed how must was paid in to the county based on the settlement sheets by that person — on behalf of that person by Mrs. Westmoreland. The difference was the amount that she collected that was documented with receipts that she did not turn over into the county general fund and that was $2,098.85.

Q. That amount that she did not pay to the county?

A. Right.

[678] Q. $2,098.85; is that right?

A. Yes.

Q. Was there another method that you used to investigate her records?

A. Yes.

Q. What was that?

A. As I said before, when she made deposits into a bank account, she just put a total of the checks that went into that account. And I got copies of the checks that people had written to her from the bank. I listed all of these checks, the amounts of the checks, and then I traced them into what she submitted to the county or paid in to the county. I found — I have only done this for calendar year 1983, and of that —

Q. Let me stop you right there and ask you why have you only done it for 1983?

A. Okay. The bank, it has taken some time for them to copy these documents, and I went down last Thursday and got these from the bank, they were still copying 82 and had not gotten to 81 yet.

Q. Okay.

A. But there was $1,974.10.

Q. Only for the year 1983?

A. Yes.

MR. BINDER: I didn't get that amount, your Honor. **[679]** What did you say lady?

THE WITNESS: 1,974.10.

MR. BINDER: Thank you.

Q. During your review of those bank records — first of all, let me ask you exactly what account are you talking about, what bank account are you talking about that you reviewed?

A. Okay. She had a bank account with the Perry County Bank that was styled or it was, the name on the account was, "Justice Court Judge, Beat 4, Perry County, Trudie Westmoreland."

Q. Did it appear to you that this bank account was used by her for what purpose?

A. For depositing the fines collected and writing the checks out of there to the county, solely for the Justice Court Judge account.

Q. Did you ever find that she deposited any personal money into that account?

A. No.

Q. In reviewing that bank account, did you ever see that she ever wrote any checks to personal things for herself?

A. Yes.

Q. What was that?

A. Well, there were two; one, she bought a computer out of the bank account, out of these fines. But the last check she wrote out of the account was a $4,000.00 check to P&W Auto Parts.

Q. And when was that?

A. That was in April of 84, after she left office in December of 83.

Q. And where did she buy the computer from; do you know?

A. Radio Shack.

Q. Was that account closed?

A. No. There is still is balance of, I don't have the exact amount with me, but 400 and something dollars.

Q. She never closed the account?

A. No.

Q. Did you have occasion to cross-reference any of the methods that you have described against each other?

A. Yes. I did each step independently of the other one. I made out my schedules of each person's name and the total amount of money. Then I cross-referenced all four schedules and eliminated any name that might have been on one schedule so that any one offense would only appear on one of the four schedules.

Q. Was this a manner of double checking for you?

A. Yes.

MRS. HARRIS: If I could have the Court's indulgence, **[680]** your Honor.

(Off-the-record discussion between Government counsel.)

Q. All right. Mrs. Patterson, I think you said that your investigation is not yet complete; is that correct?

A. That's right.

Q. And is that because you haven't gotten all of the records from the bank?

A. That, and the 1982 calendar year I have not completed the, entering the settlement sheets or the fines that she collected — I mean settled to the county on the computer and sorting it alphabetically.

Q. Would the fact that your investigation is not complete because of those reasons have any affect on the numbers, the amount of money that you have told us was not properly paid to the county?

MR. BINDER: We object to that, your Honor. Take a soothsayer to answer that question.

THE COURT: I will overrule the objection. She can explain her answer, if she can.

Q. Would you like me to repeat it?

A. No. The amount that I have, the 9,506.95, could not possibly go down because the complete audit trail has been, investigation has been done on those figures. The 1982 settlements could produce some more monies that were not turned in to the county. The checks from the bank for 1982 **[682]** and 1981 could also produce more money that was not turned in to the county.

Q. Is there any way that that amount could go down?

A. No.

Q. Mrs. Patterson, under the laws of the State of Mississippi as they were in effect at that time, the time covered by your investigation, was Mrs. Trudie Westmoreland required under the laws to turn over the funds and fees that she collected to the county?

A. Yes.

Q. And what was the result of her not turning those funds over?

MR. BINDER: We object to that. She's not a judge and she's not a lawyer. That's an improper question.

THE COURT: The objection is sustained.

MR. BINDER: Thank you.

MRS. HARRIS: We Tender the witness, your Honor.

MR. BINDER: Your Honor, we'd like to move ahead because of time, and then you'll give me some time to look at some records that — I'll go ahead now if you like.

THE COURT: All right, sir.

BY MR. BINDER:

Q. I just want to ask — I'll stop when I need to, if the Court Please. Now, I want you to please listen to what I **[683]** say, try to answer the question. If you don't understand the question, ask me, I'll rephrase it. And then after you answer it, you can explain anything that you want to explain.

Tell this jury, since you've been on board as a State auditor, if you have ever sent a letter to Mrs. Trudie Westmoreland telling her that her books are out of order and that she owes the State of Mississippi 9,000 or whatever dollars you say she's owed, did you ever send her such a letter?

A. No, sir, but she was aware that the investigation was going on. We talked to her, asked for records, and it is not normal procedure for our office to issue a letter until the investigation is completed, and we have not completed it.

Q. And isn't it a fact that she told you that when she finished office, she took all of her records, placed then before, with the Chancery Clerk, everything that she had, and didn't she tell you that sometimes thereafter one of your people before you came on board told her that her records were fine? Do you remember her saying that to you?

A. She — there is a multiple question there. She did not tell me, personally, that anybody told her her records were fine. She told me that she turned over her records to the Chancery Clerk. But when we, I went down to get her, see if **[684]** she had her bank statements, she said she might have some of them and she might have some more receipt books. And I gave her a couple of days, I don't remember how long, and told her I would come back to get those. When I came back, she said she couldn't find them.

Q. Have you been to her this year?

A. Pardon?

Q. Have you had any talks with her this year?

A. Yes, sir.

Q. When?

A. I don't know the exact date. I'd have to look back.

Q. Well, you were very precise about everything else you tell this jury; you can't even tell them when you talked to her?

A. Yes, sir, I could, if I went back to my diary which I don't have with me.

Q. Where are all of her books and records that you are testifying from today?

A. I have them in the office here.

Q. All of her books and records?

A. All that I have. The receipt books were not all there.

Q. Okay. Let me ask you another question. I notice that you were sitting out in the, in this room when this jury was selected, weren't you?

A. Yes, sir. **[685]**

Q. And you say it's not customary for the State Auditor's Office to send a letter to someone and tell them how much they owe the State of Mississippi if you feel they are out of whack?

A. I said that it's not normal procedure until the investigation is completed. That is not my responsibility any way. I an an investigator.

Q. Who would that be?

A. Mrs. Dixon.

Q. She's in this courtroom throughout this trial too, hadn't she?

A. Not throughout the trial. Part of the trial.

Q. But she's been here many days, Miss Louise Dixon?

A. A couple of days.

Q. And she is your immediate supervisor?

A. Yes, sir.

Q. And she's been consulting with you and talking with you throughout this trial, hadn't she? I have seen you two together.

A. Yes, sir, we have talked.

Q. Now, until your testimony this morning, you have never told Mrs. Westmoreland that she owes the State of Mississippi this money?

MRS. HARRIS: Your Honor, this has been asked and answered. **[686]**

THE COURT: I'll overrule the objection since she's on cross-examination.

Q. Now, you are saying —

THE COURT: Did she answer the question. I don't know if—

A. Yes, sir, she has been told. Not through the letter, but she has been told there was an investigation going on.

Q. But no official letter to her about how much money she owes or what your findings have been, have there been?

A. The findings are not complete.

Q. Finding are not complete, okay. Do you believe that when someone, you being an investigator, an auditor, when someone, you find something out of kilter, do you believe in the principle that a good auditor would go to that person and show them the findings and let them explain it if they can ?

A. Even in a financial audit, they are shown the findings in writing, but a financial audit is not even done, it's not done in writing until the audit is complete and the report is filed. Our report is not complete.

Q. When your report is complete, would it not be a standard for you to send her some kind of document and set out your findings and have her reply?

A. Yes, sir, when the report is complete.

Q. And would you agree with me that many times so-called **[687]** findings are explained or answered satisfactory to you people?

A. Sometimes, yes, sir.

Q. I saw, for example, and you represent the State Auditor's Office, that you put out in the news media that there was a half-million dollars worth of claims in Claiborne County that you just forgave, did you not?

MR TUCKER: I object to this, your Honor. It's not relevant.

MR. BINDER: Yes, it is. It's procedure, the reason she's here.

THE COURT: I'll overrule the objection.

Q. Tell this jury, isn't it a fact that you all forgave recently, for reasons unknown to me, over half a million dollars in claims in that county?

A. I was not assigned to that case and I have no knowledge of it.

Q. You don't deny it though — you can read, can't you?

A. I don't have any knowledge of it.

Q. You never heard that discussed in your office?

A. No, sir.

MR. TUCKER: I object to that, your Honor. He's arguing with the witness.

THE COURT: The objection is sustained.

MR. BINDER: I'm sorry. **[688]**

Q. Tell this jury, did you go to any of the people that were affected by this matter and take any statements from them?

A. The defendants?

Q. Yeah.

A. Yes, sir. We mailed out confirmation letters asking them if they paid the tickets.

Q. But you didn't — and only the ones that responded to you you would know something about; correct?

A. True.

Q. You didn't go see them personally, did you?

A. I have been to some personally, yes.

Q. Let me ask you this question. You compared your notes to the highway patrol tickets, I heard you testify?

A. That was one step, yes, sir.

Q. Now, did you ever go to the Chancery Clerk's tickets that he submitted, his list?

A. yes, sir. That's where the settlement sheets came from.

Q. Did you examine the highway patrol tickets that he had, the copies of the tickets that he had?

A. The ticket copies were obtained before I started the case, and I'm not aware of whether they went from those records but

they are multi-part tickets. If something is written on the top of it, it goes through to all copies so **[689]** we had three out of however many copies, they should have been the same.

Q. Madam, would it surprise you if I were to tell you that very often the Chancery Clerk's ticket and the highway patrol ticket turned in in Jackson in a J.P. case never correlate? Would you doubt that? Could that be possible, madam?

A. I would think that would be a very poor audit trail. I don't know why that would occur.

Q. Highway patrolmen are human, aren't they?

A. Yes, sir.

Q. And Justices of the Peace are human, aren't they?

A. Yes, sir.

Q. Would it shock you to learn that many times people are assessed fines in the country and they never pay those fines? Did you make a list of those?

A. No, sir. Maybe I misunderstood your question. Did I make a list of what now?

Q. You answered the question. Did you not understand it? You said, no, sir. Did you think you said the wrong answer?

A. There is a list of fines in the settlement sheets that she prepared and signed that shows the defendants who either were not guilty or they did not show up for court and had a warrant issued for their arrest. That is a part of her records that I did take into consideration.

[690] Q. I didn't ask you one question about her settlement sheet.

MRS. HARRIS: Your Honor, Mr. Binder is continuing to argue with this witness. We object to it.

MR. BINDER: I am not arguing with her.

THE COURT: Restate your question and listen to it and be responsive.

Q. Did you ever find where people were assessed a fine and then they didn't pay the fine later?

A. Yes, sir.

Q. Now, nobody in that county objected to Mrs. Westmoreland's records; you are telling this jury that someone in your department started investigation, didn't they?

A. Yes, sir.

Q. Now that's the truth, isn't it? Now, let me ask you this. You've got a B.S. degree from a fine school, Mississippi College; are you a Certified Public Accountant?

A. No, sir.

Q. You are not certified?

A. I have never sat for the exam and I am not certified.

Q. Now, your job I assume is to find discrepancies?

A. My job is to investigate discrepancies that have been turned in to us as a complaint.

Q. Now, as this trial was going on you continued to work **[691]** on this case, didn't you?

A. I've been working on this case since December, yes, sir.

Q. Told this jury that you even went down to the bank this past week; right?

A. Yes, sir, to collect records that I had asked them probably a month ago to gather for me.

Q. Now, isn't it true that some people who post bonds get out on their own recognizance, personal, they just sign a bond for $500.00 without depositing the $500.00?

A. I'm not sure about that. But the monies that I referred to —

Q. I didn't ask you —

A. — were cash money —

Q. You are not answering the question, Madam. I asked you is there — are you familiar with the fact that there is a personal, a $500.00 bond can be a personal recognizance bond?

A. Yes, sir.

Q. Now, the discrepancies that you are talking to this jury about that you say are discrepancies occurred how many years ago from your records?

A. I audited or investigated from 1981 through December of 83. 83 would be four years ago, the 81 would be six years ago.

[692] Q. So these matters happened four years ago?

A. Yes, sir.

Q. And as much as six years ago; right?

A. Yes, sir.

Q. Okay. And you mean to tell this jury that in six years you people haven't audited and gotten her to account yet for a little old J.P. account? Is that your testimony?

A. We haven't been investigating it for six years. We've been, the case has been assigned for three years.

Q. And who —

A. We went back from the date of the assignment. This was assigned to another investigator, and he tried numerous

methods, he did not have experience in computer which was one reason I was assigned to the case when I came on, because I lived in the area at that time and I did have computer experience —

Q. What was his name?

A. Charlie Robinette.

Q. Charlie Robinette?

A. Yes, sir.

Q. Does he still work for the State?

A. Yes, sir.

Q. Is he still in the Audit Department?

[693] A. Yes, sir.

Q. Now, he worked on it how many years before you got it?

A. Off and on, I guess two years. He didn't work consistently on that case, though.

Q. I'm going to put down two years. You got it and you've been on it three years; right?

A. No, sir. I got in on it December of 86.

Q. You've been on it how long then?

A. Six months.

Q. Any way you look at it, y'all have had approximately three years to audit her books; right?

A. This is not an audit. The audit was done prior to that. This is an investigation that was, that the auditors asked us to start because of improprieties they saw in her books.

Q. When was the audit finished?

A. The audit or the investigation? The audit?

Q. You told me and the jury that the investigation is still going on.

A. I don't know when the audit was completed. It's done on a yearly basis.

Q. At the end of your audit time, did you all send her a letter telling her that her books were out of balance and she owed you any money? Tell the jury if you did.

A. Not to my knowledge.

[694] Q. Okay. Now, are you telling me that you were assigned this matter in December of this year — last year?

A. December of 86.

Q. 86. Madam, are you interested in the outcome of this case?

A. Interested?

Q. Yes, ma'am.

A. Yes, sir.

Q. Did you know that Mr. Lott, the Chancery Clerk, has testified in this case?

A. I saw him and had heard on the news he testified, yes, sir.

Q. The implication of your testimony here is, is that my client purposely did something wrong to her books and records and didn't turn in funds; isn't that what you are trying to tell this jury?

A. Yes, sir. The records were not in the order of judges who properly settled their fines.

Q. But you weren't a State investigator back there when she was J.P. in those days before the new rules came in regarding county spending some money for clerks, were you?

A. I was an auditor with the State Department of Audit.

Q. But that new law brought some sanity to this small office, did it not?

A. Yes, sir.

[695] Q. Now, there were no written rules regarding bookkeeping in those days for judges, were there, these J.P.'s?

A. There was a rule about the submitting of the funds to the county on a monthly basis, that required the funds collected to be settled each month.

Q. As far as you know, she turned in her reports, didn't she?

A. She turned in her reports.

Q. Now, let me ask you something. You believe in being totally honest with the jury, don't you?

A. Yes, sir.

Q. I want to ask you a question. When you people that know or have the expertise in auditing and all, when you all find a discrepancy or series of transactions that you want explained, just sort of an investigating body, you call yourself an investigator, isn't it normal practice to lay that before the accused and let them respond to it before you would state the emphatically they owe that money?

MRS. HARRIS: It's been asked and answered about four times. Same question.

THE COURT: I'll overrule the objection.

Q. Isn't that what's normal?

A. It is normally our procedure when we finish the investigation and we have a total dollar figure, we have all of our documents together and we have our report together, **[696]** to issue a statement in writing and let the person respond to this.

Q. And would I be correct in saying that you will talk to that person or their certified accountant if they hire one or their representative and let them present other evidence to you that you may or may not be acquainted with, and you would take that in consideration, would you not?

A. Yes, sir.

Q. Has that been done yet in the case?

A. The report has not been issued, she has not been informed in writing because it's incomplete. Each case is different, and she has been informed verbally that the investigation was going on.

Q. But —

A. She has had copies or you have had copies of the reports that I have since last Wednesday.

Q. I got it Wednesday morning when I came to this courtroom, Mr. Tucker gave me that. Now, how did you know that I had it?

A. I was —

Q. How did you know to say that on the witness stand?

A. I didn't know to say it. You were in the — I was in the room eating lunch when you picked up the papers from him.

Q. Mr. Tucker gave them to me, didn't he, last Wednesday?

[697] A. Yes, sir.

Q. That's the first time in my life I've ever seen those papers, wasn't it? You had just brought them to the courthouse, didn't you?

A. Yes, sir.

Q. And they have changed from then?

A. Not those papers —

Q. They have changed 12,000, haven't they?

A. Those papers haven't. I've added an additional schedule.

Q. I'm going to show you what Mr. Tucker gave me. What's the total on that piece of paper, 7,563.40?

A. Yes, sir.

Q. Didn't you testify to this jury today the total is 9,000 something?

A. I've added an additional schedule since that time.

Q. I don't have that though, do I?

A. I don't know.

Q. When did you come up with that? I don't have that, madam, when did you get that?

A. Yesterday.

Q. Yesterday, okay. These books and documents that you have in the back room have been under your custody for how long?

A. Since December of 1986, I had got part of them then and **[698]** have continued to gather information.

Q. And I have had no opportunity as far as you know to this moment of looking at those books, have I?

A. No, sir.

Q. I'm sure the Judge will — he's already told me he'd grant me that opportunity, but they've been in your custody up until the day you testified right here?

A. Yes, sir.

Q. You don't know how many people, from what you testified to, just didn't comply with their fines; all you know from the records that you have looked at from the bank is the checks of people that were deposited that paid their fines; correct?

A. I'm not sure I understand the question.

Q. I recall your testimony this morning, and you were very knowledgeable about this. I just repeated something to you that you testified to. You testified that you went to the bank and examined the checks because she didn't put down everybody's name on the deposit slips?

A. That's correct.

Q. And I assume from what you said, and I'm sure the jury did, that those names are the people that paid their fines because you told us that?

A. Yes, sir.

Q. You haven't got a list of how many people didn't comply **[699]** with their fines though, do you? Have you compiled such a list?

A. No, sir, but I don't see how that is relevant. If I can prove that a fine was paid, then I've proven that the money was taken. And if I can prove it was not turned in to the county or paid in to the county, I can't understand the relevancy of that.

Q. There is a lot of things you don't understand, madam. I'm going to ask the questions.

MR. TUCKER: That's not a question.

THE COURT: I'll sustain the objection to the argument.

Q. Now, is it possible that your review contains any errors?

A. Yes, sir.

Q. Thank you.

A. I have checked my —

Q. I hadn't asked you a question yet.

MR. TUCKER: If the Court Please. She's got a right to explain.

THE COURT: She can explain her answer. If you are explaining your answer as to whether there is a possibility or errors, you said there is a possibility, if there is an explanation you can give it.

A. Thank you. I have checked my schedules and **[700]** cross-checked them, I have also asked another investigator to cross-check them with me.

Q. Is it possible that Miss Trudie's papers could contain some mistakes and errors?

A. Yes, sir.

Q. Is it possible that you, the figures that you have given to this jury are not right? Could it possibly be shown by her, if she has some sufficient time to defend herself against your charges, that you might be in error?

MRS. HARRIS: Objection. Calls for speculation, your Honor.

MR. BINDER: She's on cross, your Honor. She told the jury time and time again that, you know, her figures are perfect.

MRS. HARRIS: She has never told the jury that, and I object to Mr. Binder testifying.

THE COURT: Well, she, she said that her, that there was a possibility of there being mistakes, so I'll sustain the objection as being repetitious.

MR. BINDER: Thank you.

Q. You do know that no hearing has ever been had regarding any of the allegations that you've made today in this court?

MRS. HARRIS: Objection as to relevance, your Honor.

MR. BINDER: She's on cross, your Honor.

THE COURT: I'll overrule the objection.

[701] Q. There has been no hearing whatsoever about any of these charges that you have brought this last minute before this trial is over with?

A. Not to my knowledge.

Q. You have never found any record, have you, that my client has been guilty or charged with any wrongdoing as a J.P. in your investigation, have you?

A. She was written up in an audit exception, financial audit exception in the 1979 audit for fees she collected and was not entitled to because docket books were not properly prepared.

Q. Madam, you are not answering my question. In your investigation —

MRS. HARRIS: Your Honor —

Q. Please look at me instead of the other counsel.

MRS. HARRIS: Your Honor, I'm going to object to him saying she is not answering his question when she was giving him a direct answer to his question.

MR. BINDER: I will repeat what I asked her.

THE COURT: Okay, repeat your question.

Q. I asked you if you have found any records where my client has been charged with a crime, found guilty or indicted by a Grand Jury, relating to these matters?

A. Not in the investigation that I have done. Our department has found that, though.

[702] Q. But there hasn't — no Grand Jury has ever given this woman an opportunity — hadn't charged this woman with anything?

A. No, sir, she repaid the funds.

Q. I am talking about this stuff you are talking about.

A. No, sir, not on this.

Q. You are telling this jury that based on what you concede are incomplete records and incomplete order, that it's your personal opinion that these discrepancies are unaccounted for? Isn't that what you are saying?

A. Yes, sir. I am telling you if I can show you a receipt that she signed saying she took $38.50, for example, from one person, then that $38.50 should show up in the county records as having been submitted back to them, and that is not the case.

Q. Madam, let me ask you this. You told this jury that you didn't know what money that she had put in her own account; this J.P. account was her personal account, wasn't it?

A. The bank told me at one time it was her personal account but it was changed to the name of Justice Court Judge, Perry County, Beat 4, Trudie Westmoreland.

Q. But it still was under her jurisdiction, she is the one that could draw money on, put money in?

A. Yes, sir.

[703] Q. Are you telling this jury, from your audit, from the time she opened up that account, that she never put any of her personal money in that account?

A. From the time I started the investigation, there was a balance of about $200.00 in the account. I can't say whether that was personal money or county money.

Q. And you don't —

A. From that time forth, the checks, money orders, postal money orders, whatever that were deposited in the bank account that I got support from the bank from, were for traffic fines, and they were Justice of the Court related deposits. The

cash, I did not charge her with the cash because I have no idea where that cash came from. There was a balance in the account when she wrote the $4,000 check, the investigation shows that there should have been at least $9,506.95 worth of county funds in that account.

Q. That's what you say? That's what you say; right?

A. Yes, sir, through the investigation that —

Q. That's your investigation; right?

A. Yes, sir.

Q. And you are not telling this jury that you know how much personal money she ever put in that account, are you?

A. I am saying that the account did not have a balance —

Q. Well, you didn't — say yes or no and then explain.

A. No.

[704] Q. You are not telling them that, are you?

A. No. I'm saying the account did not have a sufficient balance to cover the amount of money that should have been in there that was, that had not been turned in to the county.

Q. Did you check and see whether Mrs. Westmoreland's signature was on all the copies of the highway patrol tickets?

A. Yes, sir.

Q. In Jackson?

A. Yes, sir.

Q. Were they?

A. Yes, sir.

Q. On the ones in Jackson?

A. The ones that had a deposition of the case written down, those were the only ones that I scheduled, if she signed it and wrote a disposition on it.

Q. Okay. Are you telling the jury there is anything sinister about her buying a computer?

A. Yes, sir, if she bought it with funds that were taken from people who had been stopped and paid traffic fines, that was supposed to go to the county. If she took those funds and bought a computer, that was wrong in my opinion.

Q. But you don't know that she's done that, do you?

A. I know there was not a sufficient balance in the **[705]** account that should have been there at the time she purchased the computer.

Q. You don't know that she's done that, and the only reason for you being here without having a hearing on her first is to prejudice this jury, isn't it?

A. No, sir —

MRS. HARRIS: Objection, your Honor.

Q. That's the only reason you are here, isn't it?

THE COURT: The objection to that question is sustained.

MRS. HARRIS: Would you ask the jury to disregard Mr. Binder's comments?

THE COURT: Ladies and Gentlemen: You will disregard that statement or question by counsel.

(Off-the-record discussion at the bench.)

THE COURT: Court will now recess until 1:15. Members of the Jury: Don't talk about the case with anyone, nor allow anyone to discuss it with you, and excuse you now until 1:15.

(A lunch break was taken from 11:55 a.m. until 1:15 p.m..)

(Jury present.)

THE COURT: Mr. Binder, are you ready to continue?

MR. BINDER: I've just got one little thing I want to ask her, your Honor.

[706] Q. I want to show you one of these pages that you all gave me. This is a schedule of receipts that you say are unsettled and/or settled for the wrong amount; right?

A. Yes, sir.

Q. Now, in this column, this would mean the amount of receipts collected by the judge (indicating)?

A. Yes, sir.

Q. And where you have a zero, that would show where you say that there is no money?

A. No. That money —

Q. Unaccounted for?

A. That money was not paid back to the county or to the defendant.

Q. Okay. Now let's take, for example, Belton Parks, $37.00 was collected; right?

A. Yes.

Q. And you say this wasn't paid to the county so it's unaccounted for; right?

A. It was not — in that particular case, that was something where the judge was collecting a fine on behalf of another person, in this case a Doctor Forrester (spelled phonetically) for a bill that the defendant had not paid. That was not paid back to

Doctor Forrester according to the checks that were written out of Mrs. Westmoreland's account.

Q. And if Mrs. Westmoreland gave the debtor a receipt and [707] was collecting money for Doctor Forrester and was putting his money in a separate box and gave him that money once a month, it wouldn't reflect there, would it?

A. She should have had some receipt from Doctor Forrester or some documentation showing that she paid the money to him.

Q. Let me ask you the question again and then you can explain it, ma'am. If she gave that money to Doctor Forrester, along with any other money she collected for him, just didn't put that cash with these other amounts but gave it to him, you wouldn't have put unaccounted for, would you?

A. No, sir.

Q. And if Doctor Forrecter, for example, says he got that money, that would clear up that problem right there?

A. Yes.

Q. Have you been to Doctor Forrester and see whether he got his $37.00?

A. Not yet.

MR. BINDER: That will be all, your Honor.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MRS. HARRIS:

Q. Mrs. Patterson, what is the new law that you mentioned that went into effect as far as Justice Court Judges were concerned?

[708] A. They separated the duty of collecting the monies, took that away from the responsibility of the judges and made a

Justice Court Clerk position. The Justice Court Clerk collects the fines. There was also some legal requirements as far as the bank accounts that they maintained.

Q. So it was the effect of the law that the Justice Court Judges did no longer have control, personal control over the money they collected?

A. Yes.

Q. And when did this law go into effect?

A. January 84.

Q. And when did Mrs. Westmoreland quit being a Justice Court Judge?

A. December 83.

MRS. HARRIS: That's all I have, your Honor.

THE COURT: You may stand aside.

(Witness excused.)

THE COURT: Do you have anything further from the Government?

MRS. HARRIS: No, your Honor. We finally rest.

THE COURT: Let me see counsel at the bench.

(Bench discussion, as follows, with all counsel and the Court:)

THE COURT: Do you wish to put on anything in response to that?

[709] MR. BINDER: No, sir. They didn't have the docket books or anything, but they were very cooperative and showed me everything. But there is so many records, your Honor, it would be virtually impossible for me to do anything with it.

MR. BINDER: I would like to make a motion for acquittal reflected in the record again.

(End bench discussion.)

THE COURT: Members of the Jury: I'm going to excuse you to the jury room while I consider one additional matter.

(Jury excused. 1:17 p.m.)

(Off-the-record discussion with all counsel and the Court.)

THE COURT: We are out of the presence of the jury and I'll take your motion.

MR. BINDER: Your Honor, comes now the Defendant Mrs. Westmoreland and moves the Court to instruct the jury for the defendant for reasons heretofore stated at the end of the Government's case.

THE COURT: All right, sir. The motion is overruled. Would you bring the jury back in?

(Jury present.)

THE COURT: Members of the Jury: You have now heard all of the evidence in the case. The next step in the process of the trial is for me to meet with the lawyers to hold what is called the instruction conference. I will be —

EXHIBIT "E"

TESTIMONY OF RAY DAVIS AND TESTIMONY OF JERRY KING — REGARDING HEARSAY EVIDENCE AS PROOF OF PREDISPOSITION

TESTIMONY OF LAWRENCE W. WARREN CHARACTER WITNESS QUESTIONED REGARDING MIXON'S MISUSE OF COUNTY FUNDS TO PAVE PRIVATE ROAD

[93] DAVIS — DIRECT EXAMINATION

A. Did I go see her?

Q. Yes.

A. yes.

Q. Where did you go see her?

A. At the P&W Auto Parts store.

Q. What, if anything, did you give her when you went to see her after the Permabond was delivered?

A. I gave her $60.00.

Q. $60.00, was that in cash?

A. That was in cash, and that was a payoff for making a sale, yes. Or in appreciation for her buying the Permabond.

Q. Do you know whether or not Mrs. Westmoreland had talked to Junie Mixon about you before that first occasion, the first Permabond sale?

MR. BINDER: We've been very liberal, but we're going to ask that she not lead the witness.

THE COURT: The objection is sustained.

MR. BINDER: Thank you.

Q. What, if any, conversation did you and Mrs. Westmoreland have concerning Junie Mixon, during that first sale?

A. Oh, the first time I called on her, of course, I knew that she and Mr. Mixon were good friends, and I talked to him about Mrs. Westmoreland and he had suggested in fact that I call on her. And I told her that I knew Mr. Mixon, **[94]** had done business with him for quite sometime, and he felt like that she would make me a good customer.

Q. During that period of time, were you making kickbacks or payoffs to Mr. Mixon?

A. Yes —

MR. BINDER: We object to the relevancy of that, if the Court Please. We are not on trial for Mr. Mixon's crimes.

THE COURT: What do you say in response to the objection?

MRS. HARRIS: Your Honor, it's to establish in fact that Mr. Mixon and Westmoreland had talked.

THE COURT: I'll overrule the objection.

Q. Let me ask you the question again. During that period of time, were you making kickbacks or payoffs to Supervisor Mixon?

A. I was.

MR. BINDER: Your Honor, may we approach the bench?

THE COURT: Members of the jury: I'm going to let you be excused to the jury room.

(Jury excused.)

THE COURT: We are out of the presence of the jury.

MR. BINDER: Thank you, your Honor. Comes now the Defendant by and through her counsel of record and moves for a mistrial on the grounds that the Government is attempting **[95]** to bring in other crimes that we are not charged with and the prejudice is insurmountable.

if the Court denies this motion for mistrial, then we ask that you direct the jury to disregard any crimes pertaining to any other defendant in the operation pretense other than those that we are charged with in this courtroom.

THE COURT: What does the Government say in response to the motion for mistrial?

MRS. HARRIS: Your Honor, first of all, we would respond that it's not other crimes of this particular defendant, therefore, any prejudice we submit would be minimal. Further, we submit that the testimony is offered to show the knowledge of the Defendant Westmoreland and her knowledge that this particular vendor was making kickbacks to other County Supervisors and was willing and wanting to receive kickbacks herself.

THE COURT: The motion is overruled. The Court does not construe the question as eliciting a response that the defendant was engaged in the commission of any other crimes or unlawful conduct.

How long do you anticipate that your direct examination of this witness will be?

MRS. HARRIS: It will be quite lengthy, your Honor. I've got a ways to go.

THE COURT: I have excused the jury, so I believe we **[96]** will just go ahead and take our noon recess now and court will recess until 1:15.

(Jury present.)

THE COURT: Ladies and Gentlemen. I released court until 1:15, but I failed to instruct you and I want to do that now. That you must not talk about the case or permit anyone to discuss it with you. I do that as a matter of discharging the Court's obligation at each adjournment with that admonition. You are excused until 1:15.

(A lunch break was taken from 11:45 a.m. until 1:15 p.m.)

(Jury present.)

Q. Mr. Davis, I'd like to get us back to the point where we were before the Court took a recess. I believe I had asked you whether or not you were paying kickbacks or making payoffs to Supervisor Junie Mixon before you approached the Defendant Trudie Westmoreland?

A. That is correct, and I believe I said "yes" on that.

MR. BINDER: May we have a continuing objection to the wrongdoing on the part of others?

THE COURT: Yes, sir, your objection is noted.

Q. What, if anything, did the fact that you were making payoffs to Junie Mixon have to do with you going to see Trudie Westmoreland?

A. Junie and Mrs. Westmoreland were very good friends, and **[97]** I was a friend of Mr. Mixon's, and he told me he felt like that she would make a good customer and that I could deal with her and do business with her.

Q. What was your understanding of his statement that you could deal with her?

A. Morally and basically, in the back of my mind it was basically telling me that I could approach Mrs. Westmoreland with the ideas of making a kickback without actually coming out and saying so.

Q. Did you understand that you could deal with her in a similar manner like you dealt with Mixon?

A. Yes.

Q. And that includes making payoffs or kickbacks?

A. Yes.

Q. After the first transaction that you have already testified about with the Defendant Westmoreland, did you have an occasion to conduct other similar transactions with the Defendant Westmoreland?

A. Yes, I did.

Q. In connection with your business or sales business at Davis Chemicals?

A. That's correct.

Q. Did those transactions include paying kickbacks to Trudie Westmoreland?

A. They did.

[169] KING — DIRECT EXAMINATION

MR. TUCKER: Special Agent Jerry King with the Federal Bureau of Investigation.

JERRY KING

was thereupon called as a witness for and on behalf of the Government and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TUCKER:

Q. Agent King, how long have you been a Special Agent with the Federal Bureau of Investigation?

A. It will be 20 years in July.

Q. Where are you originally from?

A. Arkansas.

Q. And prior to the time that you came on board with the FBI, what did you do for a living?

A. I was a school teacher.

Q. And, basically, during the course of your 20-year career, what have you done?

A. I have been charged with investigations of various Federal laws, in the enforcement there.

Q. And you are now assigned permanently, are you not, to the Hattiesburg office of the FBI?

A. Yes, sir, I am.

Q. Okay, Agent King, directing your attention back to 1985, at some point, did you receive a special assignment **[170]** here in Mississippi?

A. Yes, sir, I did.

Q. And what was that assignment?

A. It was to come to the Jackson division of the FBI and work in the role as an undercover agent.

Q. And prior to the time that you came here to begin that work, had not the project that you were coming to work on already been approved by all of the officials with the Department of Justice?

A. Yes, sir, that's true.

Q. Did you have anything to do with the original proposals or initiation in regard to that undercover operation?

A. No, sir.

Q. And as you understood your assignment when you came to start, what were you supposed to do?

A. I was to be a salesman in a culvert company and to attempt to do business with County Supervisors.

Q. And at that particular time, according to the original instructions that you had, were you targeting any particular Supervisors?

A. Yes, sir. The agents that were in charge of the case would advise me as to whom they had received predisposition on, and that would allow me to make a contact with that particular Supervisor to see if they would engage in transactions with me.

[171] Q. So that the jury understands, what does "predisposition" mean?

A. Predisposition, in an undercover case, is the set of facts that would indicate that an individual would be willing to take a kickback along the lines with his, his or her duties as a County Supervisor.

Q. Talking plain, Agent King, does that mean that somebody had to make a complaint about that particular Supervisor?

A. Would be a myriad of reason. Sometimes it would be a complaint, a series of complaints. Sometimes it would be another vendor telling us that he knew that that person would take a kickback. Someone had said that they would be willing or had taken kickbacks.

Q. Was that a very strict requirement in regard to this undercover operation?

MR. BINDER: We object to this type leading, your Honor. This is crucial.

THE COURT: I'll sustain the objection to the leading question.

Q. What significance, if any, to your daily work was this particular requirement?

A. I was prohibited from contacting any individual or Supervisor that I didn't have that predisposition on.

Q. Okay. Then let's go specifically to the case in issue. [172] During some point in your investigation, did you have opportunity and occasion to go to Perry County, Mississippi?

A. Yes, sir, I did.

Q. At some point did you have opportunity and occasion to come in contact with a person known as Mrs. Trudie Westmoreland?

A. Yes, sir, I did.

Q. Would you give us the background on that? How did you come to Perry County?

A. I had been in touch with another Perry County Supervisor.

Q. What was his name?

A. Junie Mixon, M-I-X-O-N.

Q. As a result of you coming in contact with Junie Mixon, what did you do?

A. I had advised him that I would be willing to pay him kickbacks for any orders that he would give me —

MR. BINDER: We would object to this type testimony and ask that you tell the jury to disregard; we are not charged with any crimes of a Supervisor named Mixon; improper to put that before this jury. We object to it.

THE COURT: The witness can testify as to the basis for his initiating an investigation or what was motivating him, so I'll overrule your objection.

A. Mr. Mixon and I had discussed the fact that I didn't [173] know any other —

MR. BINDER: We object, your Honor, on the grounds of hearsay. I don't have Mr. Mixon, as counsel opposite knows well, to cross-examine, and here this Agent is sitting up here tell-

ing me what Mr. Mixon says and that's hearsay, your Honor. You have indicated Mr. Mixon and I don't have him here to testify.

THE COURT: Inadmissible hearsay is that which is asserted for the truth of it. Mr. Tucker, what do you say in response to the objection?

MR. TUCKER: We are not asserting it for the truth at this time, your Honor, only his background information.

THE COURT: I'll overrule the objection.

A. We discussed that I didn't know any of the other Supervisors, and he and I had reached a meeting of the minds that he understood what I meant when I was talking about kickbacks. And then I asked him, I said, "Do you know of anyone else that I might could contact or, you know, that I could talk to?" And then on a second meeting or a subsequent meeting with him, I asked him, "Have you had time, you know, to talk with the others?" And he said, "Well, no one," and then he went into, "except I did talk to Trudie and you can contact her."

Q. Give us a time frame, Agent King.

A. This was early 86, like in January. And I said. "Is **[174]** she all right?" And he said, "Yes, she's" —

MR. BINDER: Your Honor, this is specific hearsay and, your Honor, may I approach the bench on this side?

MR. TUCKER: I will instruct him, your Honor, not to go into any other details in regard to this situation.

THE COURT: All right. The objection is sustained and the — well, the question is withdrawn.

Q. Without going into any specifics in regard to this conversation that you had with Mr. Mixon, what did you do?

A. On February the 5th, 1986, I went to Beaumont, Mississippi, and went to the auto parts store where Mrs. Westmoreland is also a partner of interest there.

Q. What's the name of that store?

A. It's P&W, I believe.

Q. Do you know what the "P" and the "W" stand for?

A. I assume the "W" is for Westmoreland. I do not know what the "P" stands for.

Q. Do you know what Mrs. Westmoreland's brother's name is?

A. No, sir, I really don't.

Q. Go ahead.

A. And I called her there in the auto parts office on the morning of February the 5th, 1986. And I introduced myself as Jerry Jacobs, Mid State Pipe, and that I was the gentleman who had won the grater blade bid in Perry County. And she immediately said, "Well, we don't need any. We —

[277] KING - CROSS-EXAMINATION

A. Through investigation and complaints and the reports that had been taken by other agents.

Q. Tell this jury and this Judge, name one person that reported Trudie Westmoreland to you as a wrongdoer?

A. Mr. Junie Mixon.

Q. He told you this lady was a wrongdoer?

A. He told me she'd take kickbacks.

Q. That's under your oath he said that to you?

A. He said she, you could talk to her, and "she had come to me and asked who she could do business with where it would mean

something to her," and that, in my opinion, is she is willing to take a kickback.

Q. You just told this jury that Junie Mixon told you this lady would take kickbacks. Now, you've got a problem, you stretch the truth a lot, don't you?

A. No, sir, I don't.

Q. You just told this jury that Junie Mixon told you that lady would take a kickback.

A. I think that's what he told me.

Q. What he told you is what you inferred from what he said; he told you she is a new Supervisor, you could probably sell to her, didn't he?

A. "Mean something to her" to me means a kickback.

Q. Do you believe that a law enforcement officer ought to tell the jury the truth whether it helps or harms your case? **[278]**

A. Yes, sir.

Q. Do you go along with the principle that law enforcement officers ought to be honest and forthright and it's not a matter of whether you win the case or not?

A. That's right.

Q. Okay. Well, I want to ask you to be very honest with us; don't add any words to what people say; just tell us what you know to be the truth. Name one person to this jury that informed you or your superior sitting at the end of that table that they had information that this little lady would take a kickback.

MR. TUCKER: I object, your Honor. That question has already been asked and answered; he said Junie Mixon.

THE COURT: I'll overrule your objection since he is on cross-examination.

Q. The Judge says you can answer that. Name one person.

A. Junie Mixon is the only person that I received information from about Mrs. Westmoreland.

Q. There is no one else, is there?

A. No, sir.

Q. Now, in a sting operation — I want to ask you a few more questions about that. Did you report periodically to Mr. Morgan?

A. Yes, sir.

Q. Now, were any of those meetings recorded where you —

KING — CROSS-EXAMINATION

[295] Q. I'm going to ask you again. Did Mrs. Westmoreland invite you to her place of business February 5 or did you go there on your own?

A. On February the 5th, I went there on my own.

Q. First contact with her was initiated by you?

A. Yes, sir.

Q. All right. And you sought her out; she wasn't looking for you, was she?

A. No, sir.

Q. Now, February 5 wasn't the first time you ever tried to catch her there, was it? You had been by there several times, hadn't you?

A. Yes, sir. I'd drop by and she'd be gone or something. I don't know how many times.

Q. Okay. Were the Supervisors gravitated, or particularly Mrs. Westmoreland gravitated when you would tell them that your

price was cheaper than the State list price; did that interest them?

A. I don't think it made any difference.

Q. Okay. Before you met her, what did you know about her?

A. Nothing. I —

Q. You said Mr. Junie mentioned her to you, but what did you know about her?

A. Not one thing.

Q. You didn't know that she was married; you had no **[296]** evidence that she had ever done a wrong, had you?

A. No, sir.

Q. You didn't find anyone in the community that told you she had a bad reputation, did you?

A. I didn't ask.

Q. You didn't even ask before you went to see her?

A. No, sir.

Q. There wasn't any file up here in the FBI office with any citizens calling in and saying she was a bad person, was there?

A. I didn't see any.

Q. Did you know she had only been a Supervisor for just a couple of months?

A. Well, I asked her when I met her, "How long you been in?" She said, "Since November," which had been three or four months before.

Q. Now, you are a seasoned man and I think I am. In all fairness and in truthfulness I ask you, when you first met her and you all talked about this culvert that she needed, she didn't

know a lot about Supervisor business, did she? That's the truth of it, isn't it?

A. No, sir. She didn't know about culvert size, she was relying on her road foreman and her engineer to tell her what she needed.

Q. And you tried to sell her some grater blades and she —

[475] WARREN - CROSS-EXAMINATION

Q. Just a custom of yours?

A. Yeah, we just been doing it for a long time and a lot of people have enjoyed it.

MR. BINDER: Thank you. Your witness.

CROSS-EXAMINATION

BY MRS. HARRIS:

Q. Mr. Warren, my name is Ruth Harris, I am an Assistant U.S. Attorney. I don't believe we've ever met before, have we?

A. No, ma'am.

Q. I believe you testified on direct that, that the business you do is based on bids with the county?

A. Yes, ma'am.

Q. And that all of the jobs that you have done with Perry County have been the result of submitting a bid and winning that bid, have they not?

A. Yes, ma'am.

Q. Isn't it true that once a bid is selected, that the county has no choice but to go with that particular company?

A. Basically, that's right.

Q. I think you also testified that you very rearely saw the Defendant Westmoreland personally; correct?

A. Right. Right. That's right, yes, ma'am.

Q. I'm sorry, I couldn't hear you. How well do you know her, if at all?

[476] A. Well, I've been — I've known who she is for many years because she had the little restaurant there in Beaumont. Her husband is in the gravel business, so we had a shared interest. I didn't know Trudie that well, but I know Nick, her husband.

Q. You know her husband?

A. Right.

Q. How do you know her husband?

A. Just through association. We're not close personal friends, but I been knowing him for a long time.

Q. What's his first name?

A. We call him Nick Westmoreland.

Q. Excuse me?

A. Nick.

MR. BINDER: Nick.

Q. I don't hear you. I think you need to lean up a little bit to the microphone.

(Witness complies.)

Q. Are you — do you know another Supervisor down in Perry County named Junie Mixon?

A. Yes, ma'am.

Q. Have you known him for awhile?

A. Yes, ma'am.

Q. For many years?

A. 10 years or better, maybe.

[477] Q. Are you familiar with where he lives, where his home is?

A. Yes, ma'am.

Q. It's in Perry County, isn't it?

A. Yes, ma'am.

Q. He's just recently built a new house, hasn't he?

A. Yes, ma'am.

Q. And that new house that he —

MR. BINDER: We object to the materiality of that.

THE COURT: What do you say in response to the objection?

MRS. HARRIS: Your Honor, I believe I am allowed to — my questions will show where I am leaded to, if I am allowed to, it's going to show that this witness is biased.

THE COURT: I'll reserve ruling.

Q. Mr. Mixon's house is on a road all by itself, isn't it?

A. Yes, ma'am.

Q. And that road, when he built the house, was not paved, was it?

A. No, ma'am.

Q. Didn't your company pave that road?

A. Yes, ma'am.

Q. And isn't it true that your company paved that road at no cost to Mr. Mixon?

A. No, ma'am. County paid for it.

[478] Q. The county paid for it?

A. Yes, ma'am.

Q. How much was that road worth?

A. Road probably, you know, 15,000, $16,000 probably, half-mile road, something like that.

Q. 15 to 16,000?

A. Yes, ma'am. I am guessing.

Q. Isn't that kind of a low guess?

A. Well, I don't know. I can't recall cause I, you know, I don't remember exactly what it was.

Q. Have you ever heard June Mixon describe that road being worth about 26 to $30,000?

A. Haven't discussed it with Junie.

Q. You haven't discussed it with him?

A. You mean about what it was? When we did the road, we sent an invoice to the county for the road. It was a county road I assumed, I didn't check.

Q. You assumed it was a county road; you don't even know if it was a private road or not?

A. I was asked to pave it, that's what I did.

Q. Who asked you to pave it?

A. Mr. Mixon.

Q. Mr. Mixon. And you did pave it. And his house is the only house on that road?

A. Yes, ma'am, sure is.

[479] Q. And isn't it true, Mr. Warren, that because of your paving Mr. Mixon's road, he helped you get a $600,000 paving contract?

A. No, ma'am.

Q. You deny that?

A. Yes, ma'am. How would he help me get one?

MRS. HARRIS: Your Honor, may the witness be instructed not to pose questions?

THE WITNESS: Excuse me.

MRS. HARRIS: That's all I have, your Honor.

MR. BINDER: I don't have any further questions for him.

(Witness excused.)

MR. BINDER: I'd like to call to the stand Mrs. Westmoreland.

TRUDIE P. WESTMORELAND

was thereupon called as a witness for and on behalf of the Defendant and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BINDER:

Q. Trudie, make yourself comfortable, all right?

A. It's a little close but it's okay.

Q. Talk into that microphone and talk to the jury. Tell the jury your name.

A. My name is Trudie Westmoreland.

(3)

No. 87-1910

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

TRUDIE P. WESTMORELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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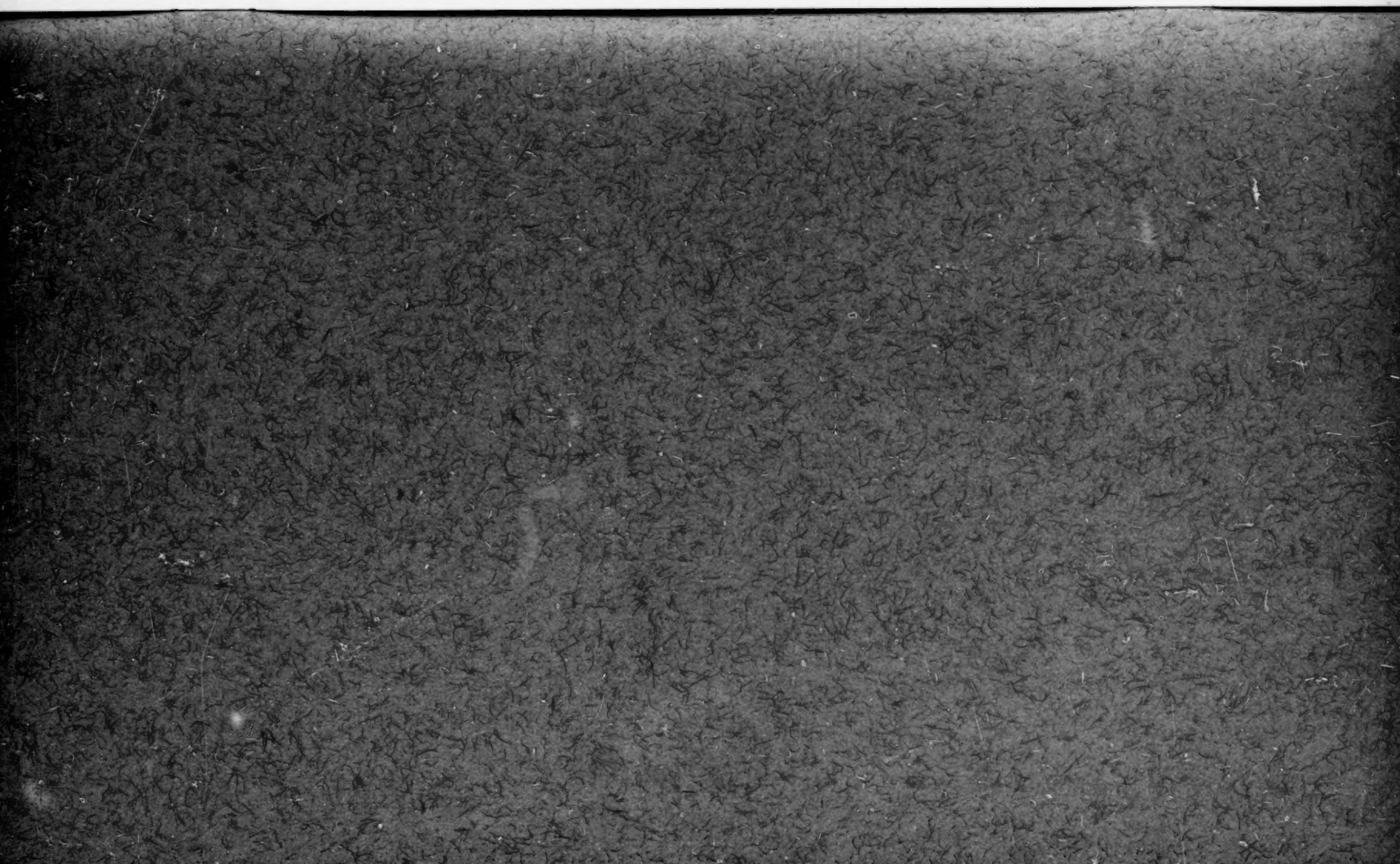

QUESTIONS PRESENTED

1. Whether 18 U.S.C. (Supp. II) 666(b), relating to bribery in connection with federally assisted programs, required that the government prove (1) that the specific transactions in connection with which the bribery occurred were funded by the federal government, and (2) that the defendant received a bribe of at least $5,000.

2. Whether the district court properly admitted evidence of prior misconduct by petitioner.

3. Whether the district court properly admitted evidence regarding another person's receipt of bribes.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 841 F.2d 572.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1988. The petition for a writ of certiorari was filed on May 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on one count of improperly accepting money in connection with transactions involving a beneficiary of federal funds, in violation of 18 U.S.C. (Supp. II) 666(b),

three counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of extortion, in violation of 18 U.S.C. 1951. She was sentenced to nine years' imprisonment and a $10,000 fine on one of the extortion counts. Imposition of sentence on the remaining counts was suspended in favor of five years' probation. Petitioner was also ordered to pay restitution to the United States government of $1,702.

1. Petitioner was a county supervisor in Perry County, Mississippi. She had the authority to purchase materials for the county for road and bridge maintenance in her district. In 1986 she accepted a total of $1,702 from FBI undercover agent Jerry King, who was posing as a salesman for Mid-State Pipe and Supply Company. The payments were made in connection with the county's purchase of supplies from King's company. In addition, the evidence showed that petitioner accepted a total of $500 in kickbacks from Ray Davis in connection with county purchases of chemical supplies from him. Pet. App. A2. During the one-year period in which the payments were received, Perry County received federal revenue-sharing funds totaling $222,949.00, and it allocated $36,391.55 of those funds to petitioner's district. *Id.* at A5. Petitioner authorized, and the county paid, a total of $14,482.92 for the goods purchased in the transactions with which the kickback payments were associated. *Ibid.*

Petitioner's defense at trial was that she was not predisposed to commit the offenses but that she had been entrapped by Agent King. Pet. App. A14-A15. During trial, the district court admitted, over petitioner's objection, testimony by Agent King that before he initiated contact with petitioner, he had a conversation with another county supervisor, Junie Mixon, in which Mixon indicated that petitioner might be willing to accept kickbacks. Davis and King also testified about Mixon's receipt of payments;

Davis's testimony was given in the course of his explanation that he made an indirect offer to pay a bribe to petitioner by making reference to Mixon's receipt of payments. *Id.* at A13. The district court also admitted evidence on rebuttal that petitioner had been investigated for keeping fees she had received while serving as a local justice court judge, even though those fees properly belonged to the county. *Id.* at A10-A12.

2. The court of appeals affirmed (Pet. App. A1-A18). It rejected petitioner's contention that 18 U.S.C. (Supp. II) 666(b) required the government to show that federal funds had been involved in the tainted transactions. The court held that the statutory language was plain and unambiguous in providing that, if an agency received more than $10,000 a year in federal funds, the agency's employees were covered by the statute. The court found that there was nothing in the statutory language or the legislative history to suggest that the tainted transactions themselves must have involved federal funds. Pet. App. A6-A9. To the contrary, the court found that the legislative history of Section 666 indicated that Congress intended the statute to eliminate the need, found by some courts under prior law, to trace federal funds to the transactions that were affected by the employee's misconduct. Pet. App. A9.

The court of appeals also rejected petitioner's challenges to the admission of certain evidence. It found that the evidence as to Junie Mixon was relevant to the issue whether petitioner was entrapped and to counter petitioner's claim that because she was a new supervisor she did not realize that she was being offered illegal payments. Pet. App. A13-A14. The court noted that the evidence regarding Mixon was a small part of the overall evidence at trial and that the jury had been instructed that it should

return a verdict only on the offenses charged and should not consider the conduct of other persons. The court further found that the evidence against petitioner was overwhelming and that it was highly unlikely that the jury convicted petitioner on the basis of the evidence relating to Mixon. *Id.* at A14-A15. The court also held that the evidence regarding petitioner's embezzlement of county funds during the time she served as a justice court judge was properly admitted under Fed. R. Evid. 404(b). The court noted that the district court had weighed the probative value of that evidence against its possible prejudicial impact, that petitioner had an ample opportunity to challenge the evidence, and that, even in light of petitioner's explanation of discrepancies in her financial records as a justice court judge, the record was clear that some discrepancies remained. Pet. App. A11-A13.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that 18 U.S.C. (Supp. II) 666(b) was not intended to cover the situation in which, although the governmental entity received more than $10,000 per year in federal assistance, the defendant received less than $5,000 in bribes, and no federal funds were involved in the particular transactions tainted by the bribes.

Petitioner's proposed construction of Section 666(b) is flatly at odds with the plain language of the statute. As the court of appeals stated,[1] the version of Section 666 that was in effect at the time of petitioner's offenses applied to the improper acceptance of payments in any amount if the government agency for which the defendant worked re-

[1] The Fifth Circuit is the only court to address the issue. In addition to the instant case, it has issued a second decision on the same point. See *United States* v. *Duvall*, No. 87-4663 (May 24, 1988).

ceived more than $10,000 per year pursuant to a federal program and the transaction or series of transactions tainted by the acceptance of improper payments involved $5,000 or more.[2] Section 666(b) applied to "an agent of an organization, or of a State or local government agency, described in subsection (a)," namely, an organization or agency "that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance." 18 U.S.C. (Supp. II) 666(a). Section 666(b) made it a felony for such a person to accept or agree to accept "anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency."

On its face, the statute barred the receipt of "anything of value" by the agent; the $5,000 requirement applied to the value of the transaction or series of transactions tainted by the agent's misconduct, not to the amount received by the agent. Petitioner's effort to characterize the $5,000 requirement as a requirement that the particular transaction affected by the bribe be funded by federal money, or that the defendant receive a bribe of at least $5,000, finds no support whatever in the statutory language.

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[2] Section 666 was substantially amended in 1986 (Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 59(a), 100 Stat. 3612), although the amendment did not significantly alter the definition of the crime of which petitioner was convicted in this case.

Nor is the legislative history helpful to petitioner. Section 666 created a theft and bribery statute generally applicable to employees of organizations or government agencies that receive federal assistance. It was originally enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1104, 98 Stat. 2143. Before the enactment of Section 666, courts had held that theft from an organization or government agency receiving federal assistance was subject to federal prosecution under 18 U.S.C. 641 only if it could be shown that the funds stolen were federal government property. It was difficult to satisfy that proof requirement, since federal funds were often commingled with other funds of the recipient agency. See S. Rep. 98-225, 98th Cong., 1st Sess. 370 (1983). Similarly, it was often difficult to prosecute an employee of an entity receiving federal funds under the federal bribery statute, 18 U.S.C. 201, because the courts of appeals were in disagreement about whether employees of such entities were public officials within the meaning of the statute. S. Rep. 98-225, *supra,* at 370.[3] As the Senate Committee explained, the weaknesses in federal law made it difficult to bring federal prosecutions for theft and bribery by employees of organizations or government agencies that received federal assistance, and the State and local governments were reluctant to prosecute such cases,

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[3] After the Senate report was filed, this Court held that the administrators of entities charged with the administration of federal grants are "public officials" within the meaning of the federal bribery statute, 18 U.S.C. 201(a). *Dixson* v. *United States,* 465 U.S. 482 (1984). The Court stated, however, that the mere presence of some public assistance does not bring an agency and its employees within the reach of the statute; in order for a person to be within the reach of Section 201(a), that person must have some degree of responsibility for carrying out a federal program. 465 U.S. at 499-500.

because they viewed the federal government as the principal victim. The Committee stated that it intended that the reference to federal programs be construed broadly, "consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." *Ibid.*

Petitioner is plainly wrong in arguing (Pet. 11-12) that the legislative history supports the proposition that Section 666(b) provided federal jurisdiction over bribery only if the amount of the bribe was more than $5,000. The legislative history on which petitioner relies relates to subsection (a) of the statute, not subsection (b). Subsection (a) provided federal jurisdiction over theft only if the amount of the theft was more than $5,000, and the legislative history that petitioner cites simply confirms that statutory requirement. Nothing in the legislative history suggests that the same $5,000 requirement applied to the amount of a bribe that otherwise fell within subsection (b). Subsection (b) contained entirely different language than subsection (a); it referred to the receipt of "anything of value" in connection with a transaction or series of transactions involving $5,000, while subsection (a) related to thefts of $5,000 or more from the organization or government agency. Thus, under either subsection, the offense had to affect transactions valued at $5,000 or more, but the nature of the effect was different. For the offense of theft under subsection (a), the effect had to be direct, in that $5,000 in funds had to be stolen from the organization or agency. Under subsection (b), by contrast, the effect could be indirect, in that the bribery offense merely had to be shown to affect transactions valued at $5,000 or more.[4]

---

[4] Petitioner's contentions (Pet. 13-14) that Section 666(b) was unconstitutionally vague or that the rule of lenity requires that the Court

2. Petitioner also claims (Pet. 14-17) that the district court improperly admitted evidence of acts of misconduct by petitioner when she was serving as a local judge, prior to her service as a county supervisor.

Under Fed. R. Evid. 404(b), evidence of other acts of the defendant may not be admitted to prove character, but may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Even if relevant under that Rule, "similar act" evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice" (Fed. R. Evid. 403).

The district court properly found that the evidence of petitioner's embezzlement of county funds was relevant to an issue other than petitioner's character, and that the probative value of that evidence outweighed the risk of unfair prejudice (Pet. App. A45-A47). The evidence consisted of testimony by a state auditor that petitioner had failed to account for $9,500 in fees that she had collected as a local judge. It was offered to rebut petitioner's defense of entrapment (see Tr. 479-556), by showing that she was predisposed to use her public office to take money unlawfully. The district court admitted the evidence on that basis and cautioned the jury that the evidence was to be used only in determining petitioner's state of mind in committing the charged offenses (Pet. App. A50-A51). Furthermore, as the court of appeals noted (*id.* at A12-A13), petitioner had an ample opportunity to rebut the evidence, and the fact that the audit that formed the

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interpret the statute in the fashion she suggests are totally without merit. As we have noted, the statute by its terms was quite precise. There is no vagueness about the jurisdictional amounts set forth in the statute, and in the absence of any ambiguity in the statutory requirements, the rule of lenity has no role to play.

basis for the state auditor's testimony was not yet complete did not render the evidence unreliable. While the auditor admitted that petitioner might be able to explain some of the discrepancies in the financial records, the auditor testified that a completed audit would nevertheless show that a discrepancy did exist.

Petitioner's reliance on *United States* v. *Biswell*, 700 F.2d 1310 (10th Cir. 1983), is misplaced. In that case, a food stamp fraud prosecution, the government elicited testimony from police officers that they were aware of past illegal activities by the defendant and that they had ongoing investigations regarding his conduct. The court of appeals found that the evidence was improperly admitted because the government did not identify the purpose for which it was offered, it did not identify a reasonably recent offense or conviction, and it offered only generalized information that the defendant was suspected of engaging in various types of criminal activity. The court therefore concluded that the evidence was of questionable reliability and that it reflected on the defendant's character rather than proving some fact relevant to the case. In this case, by contrast, the "similar act" evidence was very specific, the government offered it for a particular purpose permissible under Fed. R. Evid. 404(b), the evidence related to relatively recent conduct, and petitioner had an opportunity to rebut the evidence by challenging the accuracy of the audit. The district court therefore did not abuse its discretion by admitting the evidence.

3. Petitioner also contends (Pet. 18-21) that the district court erred by admitting testimony by Agent King that another supervisor, Junie Mixon, had told him that petitioner might be willing to accept kickbacks, and by admitting testimony by King and Ray Davis that they had paid kickbacks to Mixon.

The court of appeals correctly found that the admission of that evidence was not reversible error. Agent King's testimony was relevant to petitioner's claim that she was not predisposed to accept kickbacks. Petitioner made that contention throughout the trial, beginning with defense counsel's statement in opening argument that the jurors were "going to get a chance to see what the agent said, and I think you are going to find out that the agent had no knowledge whatsoever that [petitioner] was predisposed to do a wrong" (Tr. 23). The evidence that the FBI investigated petitioner only after learning from another corrupt county supervisor that petitioner might be willing to accept kickbacks directly countered petitioner's suggestion that the agents approached petitioner without any reason to believe she might be corrupt.

Davis's testimony about making payments to Mixon was also relevant. Davis testified that he had referred to the payments he made to Mixon as a way of indirectly inquiring whether petitioner would be receptive to a bribe. Davis's reference to the Mixon payments was therefore relevant because it provided an explanation of the circumstances under which petitioner agreed to accept unlawful payments from Davis.

Even if the admission of the evidence regarding the Mixon payments was erroneous, the error would not require reversal of petitioner's convictions. As the court of appeals noted, evidence regarding the payments to Junie Mixon was not extensive, and the evidence against petitioner was substantial (Pet. App. A14). The main issue at trial was whether petitioner had the requisite intent to commit the offense. She acknowledged receiving the payments from King and Davis, and the conversations with King during which petitioner accepted bribes and discussed the kickback schemes were recorded and played

for the jury. *Ibid.* As the court of appeals observed, "Even without considering evidence that she discussed taking kickbacks before the government became involved, surely the properly admitted evidence that she had previously used her public office for personal gain and that she dealt illegally with a vendor who was not a government agent shows that the government detected, rather than caused, her corruption" (*id.* at A15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

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(4)

No. 87-1910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TRUDIE P. WESTMORELAND,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED FOR REVIEW

4. Whether the taking of a kickback by a county official without depriving the county of property or funds will support a mail fraud conviction.

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QUESTIONS PRESENTED FOR REVIEW

4. Whether the taking of a kickback by a county official without depriving the county of property or funds will support a mail fraud conviction.

ARGUMENT

IV.
WHETHER THE TAKING OF A KICKBACK BY A COUNTY OFFICIAL WITHOUT DEPRIVING THE COUNTY OF PROPERTY OR FUNDS WILL SUPPORT A MAIL FRAUD CONVICTION.

Trudie Westmoreland was a county supervisor who was charged with taking kickbacks on county purchases. In her appeal to the United States Court of Appeals for the Fifth Circuit she maintained the evidence was insufficient to support mail fraud convictions under Section 1341 of Title 18 of the United States Code. Since the filing of the original Petition of Certiorari herein, the United States Court of Appeals for the Tenth Circuit handed down the case of *United States of America vs. Bird Lance, Jr.*, cause no. 88-1019, a copy of which is printed herein and marked as Defendant's Exhibit "A". In that case the Tenth Circuit specifically held in order to convict a Defendant of mail fraud the victim must necessarily be deprived of money and property and therefore a charge against a county official involving a kickback (where the county was not deprived of the property) would not constitute mail fraud.

The pertinent provision of the indictment in *Bird*, supra. was stated by the Tenth Circuit Court of Appeals as follows:

> "The scheme to defraud the citizens of Murray County was in substance as follows:
>
> "2. As a part of the scheme to defraud, BIRD LANCE, JR., in his official capacity as County Commissioner of Murray County, *would enter into lease-purchase agreements* for road building and maintenance equipment with Ernest Leslie Irwin, d/b/a Independent Industries, Incorporated, *in exchange for which the defendant did receive from Ernest Leslie Irwin cash kickback for encumbering the funds of the County in this manner.*"

The pertinent provisions of Trudie Westmoreland's indictment are as follows:

> 4. It was part of the scheme and artifice to defraud that:
>
> a) The Defendant would and did propose with Mid-State Pipe and Supply Company (hereinafter Mid-State) to use her position as supervisor of the Fourth District of Perry County (hereinafter county) to cause and arrange for various items to be purchased by the county from Mid-State *in return for the Defendant being paid a cash kickback* for such purposes. (Emphasis Added)
>
> ... (g) The Defendant would and did propose with Davis Chemicals to cause and arrange for various items to be purchased by the County from Davis Chemicals *in return for the Defendant being paid a cash kickback* for such purposes. (Emphasis Added)

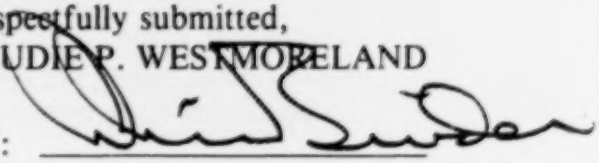
It is the position of your Petitioner that for those transactions in which Trudie Westmoreland allegedly received a kickback but where the county did indeed receive the materials, there was no mail fraud and Trudie Westmoreland should not have been convicted of the same. The Government simply did not meet its burden of proof that the county was deprived of money or property.

Petitioner believes this is an important Federal Issue which has not yet been settled. Kickbacks allegedly given in situations where goods or property were actually delivered to the county cannot support convictions of mail fraud.

CONCLUSION

Petitioner respectfully submits that her convictions for mail fraud should be reversed or at the very least remanded in as much as they were based on kickbacks and the Government did not prove for each transaction deprivation of money or property to the county.

Respectfully submitted,
TRUDIE P. WESTMORELAND

BY: 
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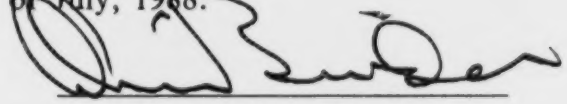
CERTIFICATE OF SERVICE

I, Alvin M. Binder, attorney of record for the Petitioner, Trudie P. Westmoreland, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Petitioner's Supplemental Brief to Honorable Charles Fried, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

This the 27 day of July, 1988.



ALVIN M. BINDER

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BIRD LANCE, JR.
Defendant-Appellant.

No. 88-1019

Appeal from the United States District Court
for the Eastern District of Oklahoma
(C.D. No. 87-369-C and 82-4-CR)

Submitted on the Briefs:

Charles Gaunce of Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, Oklahoma City, Oklahoma, for Defendant-Appellant.

Roger Hilfiger, United States Attorney, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, and BALDOCK, Circuit Judges.

SEYMOUR, Circuit Judge.

EXHIBIT "A"

Bird Lance, a former county commissioner, was indicted and convicted on charges that he defrauded county citizens of their intangible right to honest government by taking kickbacks in connection with county purchases in violation of the mail fraud statute, 18 U.S.C. § 1341 (1982). We affirmed his conviction in an unpublished order. *United States v. Lance*, No. 82-1843 (10th Cir. Feb. 29, 1984). He brought this action under 28 U.S.C. § 2255 (1982), asserting that his mail fraud convictions are invalid in light of the Supreme Court's decision in *McNally v. United States*, 107 S. Ct. 2875 (1987). The district court ruled that *McNally* should not be given retroactive effect in the context of a section 2255 proceeding, and denied relief.

We recently considered en banc the effect of *McNally* in collateral challenges to mail fraud convictions based on substantially similar schemes to defraud. *See United States v. Shelton*, ____ F.2d ____, No. 87-2865 (10th Cir. May 26, 1988) (consolidated with *United States v. James*, No. 88-1017). Our decision there is substantially dispositive of the issues raised in this appeal. For the reasons set out below, we reverse on the retroactivity issue, and we grant relief in part.[1]

I.

In *McNally*, the defendants were charged with committing mail fraud by participating in a scheme whereby they gave state insurance business to an insurance agency that agreed to split the resulting commissions with them. "The prosecution's principal theory of the case...was that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted

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[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8. The cause is therefore ordered submitted without oral argument.

honestly." *McNally*, 107 S. Ct. at 2877. The Supreme Court observed that the case before it was one of a "line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 2879. The Court, however, construed the statute to reach only frauds involving money or property. *Id.* at 2881. Because the jury instructions in *McNally* permitted a guilty verdict based solely on loss of the right to honest government, and did not require the jury to find that the victims of the fraud had lost money or property, the Court reversed the convictions. In *Carpenter v. United States*, 108 S. Ct. 316, 320 (1987), the Court reiterated its holding that the right to "honest and faithful service [is] an interest too ethereal in itself to fall within the protection of the mail fraud statute."

Lance was charged with implementing his scheme to defraud county citizens in three ways: 1) by receiving kickbacks from suppliers from whom he purchased equipment for the county; 2) by engaging in "split deals" with suppliers, whereby he and a supplier billed the county for nonexistent goods and split the purchase price; and 3) by receiving kickbacks from a supplier from whom he purchased county equipment through lease-purchase agreements. Lance's convictions became final before the Supreme Court decided *McNally*, and he did not raise the *McNally* issue at trial or in his direct appeal. Lance maintains that *McNally* invalidates his convictions, and that the district court erred in refusing to apply that decision retroactively.

II.

In *Shelton*, we concluded that *McNally* applies retroactively in a section 2255 proceeding. Slip op. at 9. Further, in considering the cause and prejudice standard applied in *United States v. Frady*, 456 U.S. 152, 167-68 (1982), to defaulted claims raised in a section 2255 motion, we concluded that a federal habeas petitioner has cause for failing to raise the

McNally issue earlier. Slip op. at 10. Those holdings are equally applicable here.

We also considered in *Shelton* whether the defendants there had established actual prejudice resulting from the erroneous theory of mail fraud underlying their convictions. In so doing, we examined the indictment, the instructions, and the evidence at trial in light of the ruling of *McNally*. Our analysis there resolves some of the issues presented in this appeal and aids in our consideration of others.

Lance was convicted on sixty counts of mail fraud,[2] which can be divided into two groups for purposes of assessing the validity of his convictions: counts that allege split deals,[3] and counts that allege only kickbacks.[4]

A. SPLIT DEAL COUNTS

We begin, as we did in *Shelton*, with the sufficiency of the indictment. Count one of the indictment provides:

> "1. During the period commencing on or about July 8, 1971, and continuing thereafter to on or about March 2, 1981, BIRD LANCE, JR., the defendant herein, while serving as County Commissioner of Murray County, Oklahoma, devised and intended to devise a scheme to defraud the citizens of Murray County by depriving the citizens of that County of their right to have Murray County's business conducted openly, honestly, and impartially, free from corruption and undue influence.

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[2]One of the mail fraud counts, count eleven, was dismissed before the case was submitted to the jury. The indictment also included four counts of extortion in violation of 18 U.S.C. § 1951 (1982), on which the jury returned a verdict for Lance.

[3]Counts one through ten and thirteen through forty-three.

[4]Count twelve and counts forty-four through sixty.

"The scheme to defraud the citizens of Murray County was in substance as follows:

"2. As part of the scheme to defraud, BIRD *LANCE*, JR., in his official capacity as County Commissioner of Murray County, *did place orders and purchase road and bridge building and maintenance materials and supplies for Murray County from various vendors, and in particular, Ernest Leslie Irwin*, d/b/a either Independent Industries, Incorporated, or Machinery Parts and Service; *Tommy L. Craft*, d/b/a T.L. Craft Road and Bridge Materials; *Billy J. Klutts*, d/b/a Okie Equipment Company; and *James E. Palmer*, d/b/a United Industrial Sales, Incorporated, *in exchange for which the defendant did receive from these sellers of road and bridge building and maintenance supplies, cash kickbacks.*

"3. It was further part of the scheme to defraud that the defendant BIRD *LANCE,* JR., in his official capacity as County Commissioner of Murray County, knowingly *did place orders with various vendors, and in particular, Ernest Leslie Irwin, Guy Moore, Jr., and Billy J. Klutts,* for road and bridge building and maintenance material and supplies which were not actually to be delivered to the County *in exchange for which Ernest Leslie Irwin, Guy Moore, Jr., and Billy J. Klutts did pay to the defendant BIRD LANCE, JR., in cash, a sum of money representing approximately 50 percent of the billed value of the fictitious and nonexistent goods which were represented to have been sold to the County.*

"4. That on or about June 29, 1977, in the Eastern Judicial District of Oklahoma, BIRD LANCE, JR., the defendant herein, for the purpose of executing the aforesaid scheme to defraud, and attempting to do so, did cause to be place in an authorized mail depository, to be sent and delivered by the U.S. Postal Service from Murray County, Oklahoma, located in the Eastern Ju-

> dicial District of Oklahoma to Okie Equipment Company, Meeker, Oklahoma, and [sic] envelope containing County Warrant Number 752, in the amount of $403.59, all in violation of Title 18, United States Code, Sections 1341 and 2."

Rec., vol. I, tab 1, at 1-2 (emphasis added).

The first group of counts consists of those that incorporate count one by reference and charge Lance with additional transactions, identified only by vendor, date, warrant (check) number, and amount, involving vendors Billy J. Klutts, d/b/a Okie Equipment Company, and Ernest Irwin, d/b/a either Independent Industries or Machinery Parts and Service. Significantly, Klutts and Irwin are included in paragraph three of count one, which alleges the receipt of money as a result of billing the county for nonexistent goods. As we stated in *Shelton*,

> "(t)his allegation of 'split deals' or 'fifty-fifty splits' charges fraudulent conduct that necessarily deprived county citizens of money or property by asserting that the county paid for items it never actually received. Although the mere allegation of receiving a kickback is not sufficient to state a mail fraud violation under *McNally*, here the count alleging split deals was expressly incorporated by reference into every mail fraud count. As a result, while all the mail fraud counts could be read as charging only kickbacks, they could also all be read as charging that each transaction involved a split deal."

Slip op. at 22-23. These counts are substantially similar to the indictment under which Fred A. Shelton was convicted. *Id.* at 21-22. As we held in *Shelton, id.* at 23, the counts state a crime under *McNally*.

Next, *McNally* requires us to consider whether the jury instructions properly required the jury to find that the victim of the scheme was itself deprived of money or property. *See*

107 S. Ct. at 2882. The instructions given here mirror word-for-word the ones at issue in *Shelton*.[5] *See* slip op. at 23-24. In accordance with our analysis there, *id.* at 24-25, we hold that the instructions are defective because they do not mandate the requisite finding of pecuniary loss by the victim.

Notwithstanding our conclusion that such instructions are inadequate under *McNally*, the record establishes that Lance suffered no resulting prejudice on those counts where split deals were actually proven. Some alleged deprivations of intangible rights are, by the very nature of the fraud involved, necessarily inextricably intertwined with the victim's loss of money or property. *See, e.g., United States v. Wellman*, 830 F.2d 1453, 1463 (7th Cir. 1987) ("the proof in this case removes any doubt regarding the nature of the scheme.") As we recognized in *Shelton*, a fraudulent scheme that deprives county citizens of their right to honest government by a split deal, in which the county pays for items it never actually

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[5]The Lance instructions state in pertinent part:

"In order to establish the mail fraud offenses, which are charged in Counts 1 though 10 and 12 through 60 of the indictment, the Government must prove the following essential elements beyond a reasonable doubt:

First: That the defendant devised or intended to devise a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises; and

Second: That for the purpose of executing or furthering such scheme, or attempting so to do, the defendant placed, or knowingly caused to be delivered by mail, a letter or other mail matter in a post office or other authorized depository for mail matter, to be sent and delivered by the Postal Service.

"The word 'scheme' includes any plan or course of action designed to deceive others, and by false or fraudulent pretenses, representations or promises, to obtain money or property from any person so deceived.

"....

"A 'scheme to defraud' means some plan to procure money or property by means of false pretenses or representations calculated to deceive persons of ordinary prudence."

Rec., vol. IV, at 1449-50.

receives, of necessity deprives the victim of money. *Shelton*, slip op. at 22.

We have carefully reviewed the record. The testimony establishes unequivocally that split deals were the basis, in whole or in part, of counts one, fourteen through sixteen, eighteen, twenty-six, twenty-seven, thirty, and thirty-two through thirty-seven. Under these circumstances, there is no possibility that the jury convicted Lance on the counts without a finding that his fraudulent scheme deprived the county of money. Accordingly, he is not entitled to relief on these counts.

The testimony establishes that the remaining counts in group one involved ten percent kickbacks to suppliers rather than split deals. Under our holding in *Shelton, id.* at 24-25, we conclude that Lance is entitled to relief on counts two through ten, thirteen, seventeen, nineteen through twenty-five, twenty-eight, twenty-nine, thirty-one, and thirty-eight through forty-three, because the jury was permitted to convict him without finding that the county, as opposed to the suppliers, was deprived of money.

B. INSUFFICIENTLY INDICTED COUNTS

Next we consider the second group, counts twelve and forty-four through sixty, which are those counts that did not allege a split deal. Although some of the counts in this group also incorporate count one by reference, see count twelve and forty-four through fifty-two, the vendors named in these counts, James Palmer, d/b/a United Industrial Sales, and Tommy Craft, d/b/a T.L. Craft Road & Bridge Materials, are not named in paragraph three of count one alleging split deals, but are named in paragraph two alleging kickbacks. *See* supra at 6.

The rest of the counts in this group consist of count fifty-three and those counts that incorporate it by reference, counts fifty-four through sixty. Count fifty-three charges in pertinent part:

"1. During the period commencing on or about April 26, 1967, and continuing thereafter to November 10, 1981, BIRD LANCE, JR., the defendant herein, while serving as County Commissioner of Murray County, Oklahoma, devised and intended to devise a scheme to defraud the citizens of Murray County and to obtain money by depriving the citizens of that County of their right to have said County's business conducted openly, honestly, and impartially, free from corruption and undue influence.

"The scheme to defraud the citizens of Murray County was in substance as follows:

"2. As a part of the scheme to defraud, BIRD LANCE, JR., in his official capacity as County Commissioner of Murray County, *would enter into lease-purchase agreements* for road building and maintenance equipment with Ernest Leslie Irwin, d/b/a Independent Industries, Incorporation, *in exchange for which the defendent did receive from Ernest Leslie Irwin cash kickbacks for encumbering the funds of the County in this manner.*"

Rec., vol. I, tab 1, at 5 (emphasis added). These counts thus allege that Lance entered into lease-purchase agreements with a vendor who paid him kickbacks.

All of the counts in the second group charge only a scheme to defraud county citizens of intangible rights by the acceptance of kickbacks from third persons. These counts are virtually identical in all relevant respects to the indictment underlying the conviction of Marvin James, which we considered in *Shelton*. *See* slip op. at 15-16. We concluded there that James was entitled to relief because "(t)he indictment contains no language which can be construed to allege that the victims of the fraud were deprived of money or property. Accordingly the indictment fails to charge a violation of the mail fraud statute as it has been construed in *McNally*." *Id.* at 17.

The analysis and authorities upon which we relied in reaching that decision, *id.* at 16-20, require the same conclusion here.

III.

In sum, we conclude that Lance has failed to establish prejudice with respect to the counts involving split deals, and we therefore affirm the denial of relief on those counts. Lance was sentenced to twenty-seven months on count one and three months on the remaining counts, to run consecutively. He was also fined $1,000 on each count. We have affirmed the validity of count one and thirteen of the remaining counts,[6] for a total of sixty-six months or five and one-half years. Lance began serving his sentence on March 30, 1984, and thus has time remaining on his sentence.

On the remaining counts,[7] we hold that Lance's mail fraud convictions are invalid because either the indictment failed to charge a crime or the jury instructions and evidence permitted Lance to be convicted on the basis of conduct that is not a crime. We remand with directions that the district court vacate the convictions, fines, and sentences on those counts. On remand, the district court should recalculate the fines and the exact time remaining to be served on the counts we have upheld.

REVERSED AND REMANDED.

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[6]Counts fourteen through sixteen, eighteen, twenty-six, twenty-seven, thirty, and thirty-two through thirty-seven.

[7]Counts two through ten, twelve, thirteen, seventeen, nineteen through twenty-five, twenty-eight, twenty-nine, thirty-one, and thirty-eight through sixty.